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IN WHOSE BEST INTEREST?

THE CONVENTION ON THE RIGHTS OF THE CHILD
AND FIRST NATIONS CHILDREN

by

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A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF
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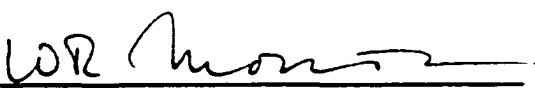
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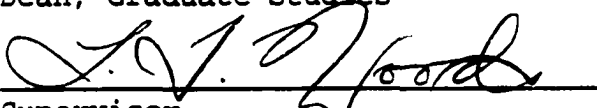
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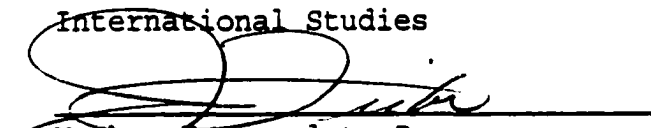
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ABSTRACT

This thesis examines the *Convention on the Rights of the Child* (the *Convention*) and its application to First Nations children. Specifically, it will address the issue of whether or not it is an appropriate and effective instrument with which to protect and promote the rights of First Nations children.

The situation of First Nations children in Canada will be examined in advance of a critique of the *Convention* to convey the need for the protection of First Nations children. Undermined by the state and society, can First Nations children rely on international legal recourse to secure a healthy and harmonious environment in which to grow?

To determine the answer, this analysis will examine the origins, the universality and the plurality of legal codes in international law. An analysis of these three dimensions suggests a rigidity in international law and the *Convention* with respect to whose rights it promotes and protects. I will examine the Sandra Lovelace Case to determine the practical implications of the *Convention* on First Nations children. The conclusion suggests that the "best interest of the child" is predetermined by underlying legal assumptions.

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NOTE ON TERMINOLOGY

While the term First Nations generally refers to Status (registered) Indians, I have chosen to use it to refer to the original peoples of Canada, Indian (Status/non-Status), Inuit and Metis. While the specific case of the Inuit and Metis has not been studied for this discussion, in including them I acknowledge the common experiences of all First peoples with respect to their subjugation by the government and society.

The terms Aboriginals, Indians, Natives are used interchangeably depending on the works to which they refer, or to the time period in which they were popularly identified as such. The term Indigenous is commonly used globally and I have used this term when referring to the international arena.

I also acknowledge that these various terms are contested both by the First Nations communities and Canadian society at large.

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This work, as all my life's work, is dedicated to the memory of my mother, Cleofas Calma Buenafe (1917-1990).

Chapter One

INTRODUCTION

According to the United Nations Children's Fund's (UNICEF) State of the World's Children (1993), 40,000 children¹ die each day and millions more live in poverty, disease and especially difficult circumstances. Some children are more vulnerable than others to circumstances which deprive them of a healthy childhood. In Canada, this is particularly true of the First Nations communities.

Six percent of Canada's children - approximately 350,000 - are First Nations children.² Despite Canada's high socio-economic standing among industrialized countries and the liberal democratic system espoused by Canadians, First Nations children continue to remain, as they have for centuries, at the bottom of western hierarchy in all aspects of society.

Juxtaposed with the plight of First Nations children is a global portrait of concerned citizens at the World Summit for

¹Under United Nations terminology, children are those 18 years of age and under.

²Denise Avar and Louise Hanvey, eds. The Health of Canada's Children: A CICH Profile, 2d ed. (Ottawa: Canadian Institute of Child Health, 1994), 133.

Children held in 1989, hosted by then Prime Minister Brian Mulroney of Canada and President Moussa Traoré of Mali. It was the largest summit in the history of the United Nations (UN) to that point. Over 70 heads of state gathered formally to embody the rights of children in international law. The resultant United Nations *Convention on the Rights of the Child* (hereafter referred to as the *Convention*) was adopted by the UN General Assembly in 1989, enforced as international law in 1990 and ratified by the Canadian government in December 1991.

The international community, through the *Convention*, acknowledges the vulnerability of children and the importance of protecting and promoting the welfare of children. Canada, in ratifying the *Convention*, agreed to a mutual commitment of countries to meet specific standards for the treatment of children within their own borders.³ Given the expectation that the international human rights regime is in place to protect individual human rights, this thesis will explore, from a First Nations perspective,⁴ the notion that the *Convention* is an instrument to be

³Canadian UNICEF Committee. The Convention on Children's Rights: A summary (Toronto: Canadian UNICEF Committee, 1995), (pamphlet) inside panel.

⁴In this analysis, I do not purport to speak for First Nations children. Rather, I will examine the *Convention* from the standpoint of the historical and material oppression of the First peoples of Canada by the government and society.

used to protect and promote the rights of children. It will seek to address the question: Is the Convention an appropriate and effective instrument with which to protect and promote the rights of First Nations children?

At first glance, the Convention represents a commendable effort by nation-states to redress the imbalances and injustices against children; this is especially crucial because children cannot speak for themselves. However, despite the proliferation of international human rights treaties, there is a vast discrepancy between international human rights theory and practice, as evidenced by human rights abuses in all corners of the world.

Legal discourse, particularly the conferring of rights, is empowering to many. But whom does it empower? Does the Convention empower First Nations children and create an area of dignity, a space they so greatly need?

Legal discourse is exceptional in the sense that, unlike other social and political discourses which allow for various sites of authority, in law there is only one site: on the side of the law. Individuals and collectives, organizations and governments are expected to stay within the law. However, staying within the law has often had deleterious effects on the most vulnerable groups in society, and particularly First Nations children.

In Canada, access to the courts by First Nations communities, as in Delgamuukw v. the Queen (aboriginal rights), Attorney-General of Canada v. Lavell and Isaac et. al. v. Bedard (sexual equality), and Racine v. Woods (child adoption), has illustrated competing discourses. However, the more important issue is the power of the dominant legal discourse to define and prescribe identity. Subsequently, the social, economic and political requirements of such an identity are determined by legal discourse.

In Delgamuukw v. the Queen, Justice McEachern of the Supreme Court of British Columbia ruled that First Nations had no aboriginal rights by discounting the identity of the Gitksan Westsuwet'en, as presented by them through oral histories and traditions and ethnographies. In Attorney-General of Canada v. Lavell and Isaac et al. v. Bedard, sexual discrimination in the Indian Act (1951) was elided by a judgment that the Indian Act superceded the Canadian Bill of Human Rights. In Racine vs. Woods (1983), Justice Wilson stated:

It has nothing to do with race, absolutely nothing to do with ethnic background. It's two women and a little girl and one of them doesn't know her. It's as simple as that; all the rest of it is extra and of no consequence ...⁵

⁵Racine v. Woods, [1983] 1 D.L.R. (4th) 193 (S.C.C.), as quoted in Samuel Bull, "The Special Case of the Native Child," The Advocate 47, 4 (1989), 526.

Similarly, access to the international legal system has been frustrating, if not futile, for First Nations. In Ominayak, the Lubicon Cree challenged the encroachment of oil exploration companies in Northern Alberta. In the Mikmaq, Mikmaq communities requested a separate seat in the Ministers' Conferences on Aboriginal Constitutional Matters.⁶ In both cases, these First Nations groups attempted to exercise their right through an Optional Protocol⁷ and invoked Article 1 (right of self-determination) of the *International Covenant on Civil and Political Rights*.⁸ In the former, the ruling stated that the oil exploration companies were impacting on the cultural survival of the Lubicon Cree, not on their rights of self-determination.⁹ In the latter, Aboriginal participation in the Conferences were left up to the Canadian government. In both cases, the Commission stated that the right of indigenous peoples to self-determination "was not within

⁶Douglas Sanders, excerpt from "Developing a Modern International Law on the Rights of Indigenous Peoples, a report for the Royal Commission on Aboriginal Peoples, December, 1994," in Sanders, "International Human Rights Law, Spring 1996," [Course Material] Faculty of Law, University of British Columbia, Vancouver, A-B-5.

⁷An Optional Protocol allows individuals to take cases to the International Human Rights Committee for adjudication, after the exhaustion of reasonable domestic remedies, in Sanders, A-B-3.

⁸Ratified by Canada in 1976.

⁹Sanders, A-B-5.

the competence of the Human Rights Committee to express views on the subject."¹⁰ As Douglas Sanders observed, the results were inconclusive and the Committee failed to appreciate the complexity of the situation. As a result,

the lengthy "views" of the Committee recount the positions of the two sides, without concrete conclusions, except for suggesting that the cultural life of the Lubicon Cree has been endangered."¹¹

It would seem that what is true within the boundaries of the state is also true in the international arena with respect to legal discourse. This then leads us to the Convention, and to the question, does the reification of the nation-state as "parens patriae," as protector and promotor of the rights of the child through a 'binding' treaty such as the Convention, safeguard the rights of a First Nations child to a secure and healthy childhood?

In seeking answers, I will contextualize the aim of this analysis by demonstrating the urgency of the situation of First Nations children and the need for their care and protection. In 1989, Patricia Monture observed that "the situation of First Nations children was cited as the single greatest problem

¹⁰Sanders, A-B-5.

¹¹Sanders, A-B-6.

confronting the child welfare system in Canada in the 1980s."¹² To this end, chapter two will comprise of a compilation of statistics pertaining to First Nations children which demonstrate their abysmal status in Canadian society. The plight of First Nations children will also be discussed in its historical context, situated as it is within the colonial history of First Nations in Canada. Further, a discussion on the Convention, its provisions and general principles is necessary to illustrate the comprehensive standard to which all children are entitled. A brief summary of the history and the content of the Convention will be discussed with specific reference to Articles pertaining to indigenous peoples.

In chapter three I will focus on an analysis of the international human rights discourse, beginning with the premise stated by Peter Goodrich:

As a totality of discourses and practices, the legal institution continuously strives to present the legal code as the symbolic representation of an ideal sociality, as a way of life and as the fundamental morality of belonging to the social whole.¹³

¹²Patricia Monture, "A Vicious Circle: Child Welfare and the First Nations," Canadian Journal of Welfare Laws 3, 1 (1989): 8.

¹³Peter Goodrich, Reading the Law: A Critical Introduction to Legal Method and Technique (Oxford: Basil Blackwell, Ltd., 1986), 217-218.

To appreciate Goodrich's argument, it is necessary to examine the source of the international human rights discourse. I suggest that the origins of international law, its construction of universality and legal pluralism frame the discourse; that is, they define whose rights are protected and promoted. International human rights law spoken in the manner of western liberal jurisprudence, establishes strict parameters and elicits competing discourses, often to the detriment of those in need of protection. As Zygmunt Bauman argues, "one thing that liberalism cannot cater for is precisely the matter of justice, social justice."

To substantiate this argument, I will examine the Sandra Lovelace Case,¹⁴ a case that was instrumental in the government's amendment of the *Indian Act* in 1985. However, the International Human Rights Commission's decision that Canada was in breach of Lovelace's right to belong to an ethnic minority, rather than sex discrimination in the *Indian Act* (a violation of the 1948 *Universal Declaration of Human Rights*), is testimony to the fact that international human rights laws can deny one's birthright to equality despite the system's objective otherwise. Lovelace, who

¹⁴Sandra Lovelace, a Maliseet from Tobique Reserve, New Brunswick, filed an application with the International Human Rights Commission in 1977, claiming that loss of Status as a result of marriage to a non-Indian under the *Indian Act* was discriminatory.

resides furthest from the halls of power as an indigenous person and a woman, was denied her birthright of equality which the international human rights system claims to protect universally.

Chapter four will critique the Convention, identifying issues directly pertinent to First Nations children and using the Lovelace case to conceptualize what the Convention means to First Nations children. Are the rights embodied in the Convention inalienable to First Nations children? Cynthia Price Cohen observes that "the linguistic interpretation of the Committee on the Rights of the Child is integral to its emerging jurisprudence."¹⁵ This section therefore will examine the practical implications of the Convention on First Nations children.

Arthur Dyck argues that "human rights can and must be reconceptualized in a way that clarifies, rather than obscures, how we come to know and actualize them."¹⁶ This study is an attempt to conceptualize the meaning of rights of those who cannot speak for themselves, and of those who remain in the margins of the dominant social order. It is important to challenge the Convention - "to ask it new questions and hold it up to new contexts" - in order to

¹⁵Cynthia Price Cohen, "Rights of the Child," St. Thomas Law Review 6, 1 (1993), 5.

¹⁶Arthur J. Dyck, Rethinking Rights and Responsibilities: The Moral Bonds of Community (Ohio: Pilgrim Press, 1994), 11.

reconstitute symbolic meanings of rights, of children, of ethnicity, in the most positive and harmonious way, to ensure a healthy future for First Nations children for seven generations.

Chapter Two

The Historical Context

The purpose of this chapter is two-fold. First, I will demonstrate the need for care and protection of First Nations children by examining their status in Canadian society, and by providing an explanation of their status within the historical context of First Nations/non-First Nations relations. Second, I will examine the *Convention*, an instrument for the protection of children from neglect and abuse. Its origins, guiding principles and specific references to indigenous peoples. These objectives provide necessary information in advance of a critique and make it possible to appreciate fully the issues that limit the *Convention* from protecting and promoting the rights of First Nations children.

First Nations Children

According to the 1991 census, there are 1.1 million self-identified First Nations¹⁷ peoples in Canada, of whom 361,670 are

¹⁷Status, Non-Status, Metis and Inuit.

children below fifteen years of age. This represents 37% of the total First Nations population. Non-First Nations children under 15 years comprise 21% of the total non-First Nations population. First Nations children comprise 6.4% of all children in Canada. The birth rate for Indian and Inuit women is twice that of the overall non-First Nations female population. Five percent of the First Nations population is 55 years and older, as compared to 21% of the Canadian population, figures which support the observation that "while the bulk of the Canadian population is aging into retirement years, the majority of the Aboriginal population is aging into reproductive years."¹⁸ While the birth of children is the regeneration of nations, it is important to examine the environment to which they are born and the future that they hold.

First Nations children are the most disadvantaged children in Canada. Consider the evidence:

- Canada's infant mortality rate (IMR), a popular indicator used to assess a country's developmental progress, is one of the lowest among industrialized countries: an average rate of 7.3 per thousand live births from 1986-1990. The IMR for Status Indian babies during the same years, however, was appallingly

¹⁸All statistics in this paragraph from Avard and Hanvey, eds. The Health of Canada's Children, 131-135.

high, almost twice the total Canadian rate and similar to the Canadian rate of the 1960s. The rate was even higher for Inuit babies, as shown in Table I. Post neonatal (28 days to 1 year) deaths from 1984-1988 were more than three times higher for Status Indians.¹⁹ In 1985, G. Rowe and M. J. Norris projected that the 1996 IMR of Status Indians corresponds with the 1971 non-First Nations level, a lag of 25 years.²⁰

**Table I: Infant Mortality Rates, 1986-1990
per thousand live births**

	0-12 months	1-12 months	< 1 month
STATUS	13.8	7.9	6.0
INUIT	16.3	11.2	8.4
CANADIAN	7.3	2.5	4.7

[Source: Avard and Hanvey, The Health of Canada's Children, 141.]

- Examining the causes of death, from 1989-1991 more Status Indian children died than other Canadians from the six most common causes of death listed in Table II. Out of six causes of death, only one category registered the same number of deaths. Sudden Death Infant syndrome was the leading cause of death of Indian babies, a rate three times greater than the Canadian rate.

¹⁹Ellen Bobet, Inequalities in Health: A Comparison of Indian and Canadian Mortality Trends (Ottawa: Health & Welfare Canada, 1990), n.p.

²⁰G. Rowe and M. J. Norris, Mortality Projection of Registered Indians 1982 to 1996 (Ottawa: StatsCan, 1985), 37.

Table II also shows that the injury death rate for First Nations infants was almost four times that of Canadian infants.

**Table II: Infant Death Rates for Selected Causes, 1989-1991
per thousand live births**

Cause	STATUS	CDN
Birth Defects	2.8	2.2
Sudden Infant Death	2.4	0.8
Asphyxia, anoxia, hypoxia	1.2	1.2
Prematurity, Low birth weight	0.9	0.4
Injury	0.8	0.2
Pneumonia, Bronchitis	0.7	0.3

[Source: Avar and Hanvey, 142.]

- In 1990, Statistics Canada reported an overall Canadian disability rate of 5.2% among children under five years of age. A study of two Cree/Ojibwa communities in Northwestern Ontario found 12.1% were disabled.²¹

²¹Christopher Bagley, "Adoption of Native Children in Canada" in H. Alstein & R. Simon, eds. Intercountry Adoptions (New York: Praeger, 1991), 57. Because the total First Nations children disability rate is unavailable, I have included this figure to show that the rate is probably higher than the Canadian rate. The lack of comprehensive data on First Nations children is indicative of their status in society. In mainstream publications on issues such as Canadian children's health rights and risks, I find that First Nations children are relegated to a very minimal amount of text, despite the considerable evidence of their neglect.

- From 1989-1991, the average injury death rate for Indian teenagers was more than three times greater than the Canadian rate.²²
- The adolescent suicide rate of First Nations was five times greater than the rate for for the rest of the Canadian population (see Table III).
- Table IV shows an equally disturbing comparison of death rates between the First Nations and non-First Nations populations.

**Table III: Suicide Death Rates 10-19 years, 1986-1990
per 100,000**

	TOTAL	MALE	FEMALE
Status	37	54	19
Canadian	7	12	2

[Source: Avard and Hanvey, 144.]

Table IV: Death Rates, 1984-1987/88 per 100,000

Age Group	Canadian	Indian
1 - 14	29	85
15 - 24	81	284
All ages	661	953

[Source: Ellen Bobet, Inequalities in Health: A comparison of Indian and Canadian Mortality Trends (Ottawa: Health & Welfare Canada, 1990) n.p.]

²²Avard and Hanvey, The Health of Canada's Children, 143.

With respect to socio-economic indicators, First Nations children are born into an environment that is less likely to meet their needs and ensure their healthy development than it is in the case of non-First Nations children. Consider the following points:

- While the child poverty rate of First Nations is unavailable, "a very high proportion of Aboriginal people live below the poverty line ... many Aboriginal children in Canada experience living conditions similar to those in Third World countries."²³
- Most First Nations children live in inadequate and crowded dwellings. Only 2% of Canadians are likely to live in crowded dwellings, compared to 11% of Indians off reserve, 29% of Indians on reserve and 31% of Inuit. Similarly, 6% of non-First Nations live in dwellings without central heating, compared to 9% of Indians off reserve, 37% of Indians on reserve and 17% of Inuit.²⁴
- In 1991-92, 4% of children on reserve were 'in-care'; that is, they were designated wards of the state. While this figure has been reduced from 5.4% in 1981, it is important to note that this figure represents only on-reserve Status children and

²³Avard and Hanvey, 140.

²⁴Avard and Hanvey, 137.

excludes Status and non-Status children off-reserve, as well as Metis and Inuit children. Ten years ago, 20% of all children in substitute care were from the First Nations community. At that time, this community accounted for only 6% of Canada's population. Today, only 0.8% of non-First Nations children are in-care.²⁵

- First Nations people age 15 to 49 have lower levels of education than other Canadians. Although the educational level of First Nations has improved in recent years, it is still lower than the overall Canadian level. In 1991, 17% of 15 to 49 year-old Aboriginal people had less than 9 years of schooling, while 33% had some post secondary education. For the total Canadian population, the figures are 5% and 51% respectively.²⁶
- In 1991, First Nations people were less likely to be in the labour force, have lower income and more likely to be welfare-dependent than the rest of the Canadian population, as shown in Tables V and VI. The income distribution shown in Table VI provides evidence of the poverty of First Nations communities.

²⁵Community Panel, Family and Children's Services Legislation Review in B.C. Aboriginal Committee, Liberating Our Children: Liberating Our Nations. (Victoria: Ministry of Social Services, 1992), 1.

²⁶Statistics Canada, Schooling, Work and Related Activities, Income, Expenses and Mobility, 1991 Aboriginal Peoples Survey (Ottawa: Ministry of Industries, Science and Technology, 1993), xi.

Table V: Labour Force Participation, 1991 (percent)

	All Aboriginals	All Canadians
Employed	57	68
Unemployment rate	25	10

Table VI: Income, 1991 (percent)

	Aboriginals	Total Canadian
No Income	13	9
< \$2,000	12	6
\$2,000-\$9,999	29	20
\$10,000-\$19,999	23	22
\$20,000-\$39,999	18	28
> \$40,000	5	15

[Source: Statistics Canada, Work and Related Activities, xiv-xv.]

Aggregate statistics can provide glowing reports on the overall status of all Canadians. For example, the United Nations Development Programme's Human Development Report 1995 ranks Canada as the best place in which to live according to the human development index.²⁷ UNICEF's annual report State of the World's Children consistently posts enviable statistics describing Canadian

²⁷United Nations Development Programme. Human Development Report 1995. (New York: Oxford Press, 1995), 18. The human development index (HDI) is a calculation used to rank the developmental progress of nations. According to UNDP, the HDI takes into consideration situations wherein people lead long and healthy lives, are able to acquire knowledge and have access to the resources needed for a decent standard of living.

children. However, the deplorable status of First Nations children is poorly represented by this type of assessment. Separate statistics for First Nations emphasize not only the disparities in Canadian society, but the depth and magnitude of the disparities. These statistics expose inequities that are so great that one cannot help but ask why. A discussion on the status of First Nations children cannot be separate from a discussion on the colonial history of the First Nations peoples. Consistent with the theory of internal colonialism,²⁸ the subjugation of First Nations peoples by the domination of the state and white society began with first contact with the *white man*. The European immigrant society's assumption of superiority in all aspects - social, cultural, economic, political, religious and ethnic - developed into a state-sanctioned and society-condoned oppression of First Nations people.

With the gradual usurping of their land, the erosion of their traditional livelihoods and the imposition of European values, beliefs and institutions, First Nations peoples have been reduced

²⁸Colonialism: creating a sense of dependence among a nation or group, the objective of which includes the extraction of benefits by the dominant nation or group; as defined in M.D. Sinclair and N. Bala, "Aboriginal Child Welfare in Canada" in N. Bala, et. al., eds., Canadian Child Welfare Law: Children, Families and the State (Toronto: Thompson Educational Publishing, 1991), 130. It is generally accepted that internal colonialism refers specifically to the domination of indigenous peoples by a state created and governed by the foreign majority.

to the welfare-dependent society that they are today. As Evelyn Kallen explains in Ethnicity and Human Rights in Canada,

Aboriginal population (Indians, Inuit and Metis), whose bicultural characteristics diverged most markedly from those of the dominant ethnic categories, were found at the bottom of Canada's ethnic hierarchy ... they constituted a racially stigmatized and structurally dependent ethnoclass having the lowest status of all minorities.²⁹

The most blatant instrument of oppression was and continues to be the *Indian Act*.³⁰ In the government's manipulative language, the Act was intended to "protect" the uncivilized; in practice, it was a policy for assimilation intended to usurp their self-governing and self-determining powers, their land and livelihood, their societal and cultural traditions. Through this discriminatory act, the government legislated a separate identity for First Nations people, unequal to the rest of Canadian society, and imposed European management of their land and peoples. Over time, original peoples of this land became a minority, albeit a distinct one, dominated by the immigrant society.

With the *Indian Act* (1876), the government formalized the reserve system, which came to be regarded as a training ground in

²⁹Evelyn Kallen, Ethnicity and Human Rights in Canada (Toronto: Oxford University Press, 1995), 123.

³⁰Original Act was passed in 1876; subsequent 'major' amendments in 1951 and 1985.

'civilization' where the Indian could be taught to live like a European with European values, and thus made capable of being assimilated."³¹ The government's ever present intervention was aimed at "producing both the material and cultural conditions which would further the degree of conformity with anglo-European standards."³² Brad McKenzie and Peter Hudson describe this process as a systematic devaluation of the norms, values and opinions of the native groups - a process, they argue, that continues today:

The historical benefits of land, fur and buffalo which accrued from the colonization of native people are well known. Less accepted is the fact that modern society continues to benefit from the dependency and under-development of native people ... for example, resource extraction on native land, native people as reserve labour and as consumers of goods and services, including social services.³³

Because colonial relationships are systems of power, with the dominant society wielding decision-making powers, the dominance and misuse of power by the white society are clearly evident in the treatment of First Nations children - the unwitting pawns of the

³¹Kallen, Ethnicity and Human Rights in Canada, 173.

³²Terry Wotherspoon and Vic Satzewich, First Nations: Race, Class and Gender Relations (Scarborough: Nelson Canada, 1993), 84.

³³Brad McKenzie and Peter Hudson, "Native Children, Child Welfare and the Colonization of Native People," in Kenneth L. Levitt and Brian Wharf, eds., The Challenge of Child Welfare (Vancouver: UBC Press, 1985), 130.

government's game of assimilation and subsequent integration. Intrusive Eurocentric regulation of childhood and family life among First Nations, jurisdictional disputes³⁴ between the federal and provincial government regarding child service delivery and the blatant racism in policies, practices and child care workers, had deleterious effects to their children and their culture. It is now widely accepted that Canadian child welfare practices have been, and continue to be, a major factor in the deterioration of aboriginal cultures in Canada.³⁵ Critics of native child welfare practices then and now conclude that these policies and practices towards First Nations children reflect a pattern of extension of colonial control.³⁶

Assimilationist policies such as residential schooling,³⁷ the

³⁴First Nations are effectively "wards of the federal state" by virtue of the *Indian Act* and its encumbent social-political-economic entitlement. However, jurisdictional disputes have always been problematic. In the *Indian Act* (1951), Section 88 subjected First Nations to provincial legislation, however indeterminate the legislation seems to be, as they apply to First Nations. For instance, in matters of health and education, First Nations continue to be 'objects' of jurisdictional disputes.

³⁵Sinclair and Bala, "Aboriginal Child Welfare in Canada," 171.

³⁶Levitt and Wharf, eds. The Challenge of Child Welfare, 87.

³⁷Residential schools were first introduced in the 17th century. In the late 19th century they evolved to industrial residence schools, and were part of government practice until the late 1950s. The last closure of residential schools occurred in the 1970s.

practice of non-aboriginal adoption prevalent in the 1960s,³⁸ and the child apprehensions and foster care of the 1970s and 1980s served to destroy the fabric of First Nations society. The cumulative effect of government policies and practices resulted in the most serious crisis in Canada's child welfare system.

Although First Nations were receptive to formal education and requested schools for their children, the residential schools created by the government and run by Christian missions were often miles away from the reserve. These schools necessitated the removal of children for up to 10-12 months of the year, in an environment in which Indian lifeways were not permitted and the purpose of which was to get the "Indian" out of the child. The denial of language, cultural heritage, traditional practices and beliefs was "to separate our people from our culture and instill European cultural value in us."³⁹ Worse, evidence of physical, emotional and sexual abuse came to light only recently, with the legacy of violence, alcoholism and abuse as a direct consequence. Devoid of normal family relationships and a sense of belonging and identity, Bagley explained that the residential schools "released" native

³⁸Familiarly known as the 60s scoop.

³⁹Community Panel, Liberating Our Children, 18.

people from these schools "demoralized, bewildered, and unprepared for any but the most marginal existence."⁴⁰

With the decline in residential schools and the slow demise in the 1970s, aboriginal adoption and foster care supplanted the government's assimilation strategy. First Nations children effectively became wards of the province. In British Columbia alone, 40% of children in non-aboriginal adoptive homes were aboriginal children, despite the fact they represented only 4% of the population.⁴¹ Between 1984-1994, this number had decreased to 30% while First Nations people represented approximately 5% of the provincial population.⁴² Owing to the imposition of the dominant society's standard of care and standard of living on First Nations communities, children were apprehended for short or long-term foster care or 'adopted-out' at an alarming rate. The government's failure to accept the legitimacy of the life philosophy and child-rearing practices of First Nations led to policies and practices in child care and welfare delivery that were entirely prejudicial against First Nations children.

⁴⁰Sinclair and Bala, "Aboriginal Child Welfare in Canada," 175.

⁴¹Panel to Review Adoption Legislation in BC, Report to the Ministry of Social Services (Victoria: Ministry of Social Services, 1994), 11.

⁴²Panel to Review Adoption Legislation in BC, 11.

The fostering of First Nations children by non-First Nations peoples, concurrent government funding for the adoptive family and the denial of the child's own culture had significant negative impact on the essence of family life within First Nations communities, and more importantly, on the identity of First Nations peoples. Their children were treated like commodities.⁴³ In the case of the Spallumcheen Band in BC, 150 children were removed from the community from 1960-1980. Because the Band's population was only 300, the removal of these children "had a dramatic effect upon the community population and sense of future." In most cases, the effects were tragic, not only from the perspective of cultural denial, but also from the overwhelming evidence of physical, emotional and sexual abuse by the adoptive family.⁴⁴

The state's policy, using children as primary tools of assimilation, and the internalized discriminatory social codes in Canadian society have ensured that the cycle of victimization begins at birth and is passed on to succeeding generations.⁴⁵ A First Nations child born today faces cultural conflict,

⁴³Community Panel, Family and Children's Services Legislation Review in B.C., Liberating Our Children, 19.

⁴⁴Bagley, "InterCountry Adoption," 187.

⁴⁵Wotherspoon and Satzewich, eds. First Nations, 88.

jurisdictional disputes, a legislated identity, extreme poverty and other socio-economic problems. It is little wonder then that First Nations children are more likely to die at birth, are more susceptible to disease, live in inadequate homes, have lower levels of education and live below the poverty line. They are more likely to get in trouble with the law or be substance abusers. As victims of abuse, they are likely to be abusers themselves. They are less likely to function within their potential in an environment hostile to their needs as children, and later as adults. Sadly as Satzewich and Wotherspoon explain,

one of the devastating consequences of the social conditions experienced by native peoples is that very few of them have gone untouched by widespread poverty and related social afflictions either in their own experiences or through someone close to them. At their worst, these problems have created a certain inertia and hopelessness among some segments of the indigenous population.⁴⁶

A significant response of the First Nations peoples, which resounded even louder during the 1970s and 1980s (and up to today), in face of the legacy of the assimilationist policies encapsulates the frustration of the First Nations communities: "Is the system

⁴⁶Wotherspoon and Satzewich, 103.

conditioning our young for lives in institutions and not in society?"⁴⁷

Monture argues that the "disregard of the Indigenous factor within the Canadian child welfare system is merely a reflection of the position of First Nations within Canadian society."⁴⁸ Indicative of life in the margins of society, Avard and Hanvey have reported similarly abysmal statistics five years prior, commenting that,

It appears that little has changed. Aboriginal peoples live in deprived circumstances, and consequently, when combined with the implicit and explicit racism of our society, they are doubly oppressed.⁴⁹

That this historical reality has shaped the lives of First Nations people is unquestionable. But what is even clearer is that First Nations children are in need of protection. Because the legacy of the past and oppression of today, far too many First Nations children are denied a healthy childhood. In this case, it is imperative that states are held accountable for their actions which significantly affect those who cannot speak for themselves, and more so, those whose voices are not permitted to be heard. The

⁴⁷Sinclair and Bala, "Aboriginal Child Welfare Laws," 172.

⁴⁸Monture, "A Vicious Circle," 7.

⁴⁹Avard and Hanvey, eds., The Health of Canada's Children, 146. Author's emphasis.

reality of the lives of First Nations children raises the issue of legal recourse with respect to their neglect and abuse by the Canadian government and society.

The Convention on the Rights of the Child

The *Convention on the Rights of the Child* became the most rapidly ratified international human rights treaty in history. By 1993, 159 countries had ratified the *Convention*. Canada ratified it in 1991.⁵⁰

The *Convention*, having arisen out of the non-binding *Declaration on the Rights of the Child* (1959), became international law after 10 years of deliberations. It was initially proposed by the Polish Government in 1978. Increased human rights awareness evoked by continuing atrocities and casualties of war and the recognition of children as a "vulnerable group requiring special care and attention" opened the discourse of children's rights in the international arena. The *Convention* ultimately represents the culmination of fifty years of international efforts to set universal standards in human rights and encompasses the most

⁵⁰Ratification by the first twenty countries automatically enforces it as international law. UNICEF Canada, "Children's Rights in Canada," [information sheet].

detailed and comprehensive in the rights it recognizes of all human rights instruments.⁵¹

Described as a Magna Carta for children, the Convention codifies childrens' rights insofar as they are obligations among signatory states. It contains fifty-four articles detailing the individual rights of any person under eighteen years of age to develop her or his full potential, free from hunger and want, neglect and abuse. It is a document of breadth, encompassing civil, political, economic, social and cultural rights, and acknowledges detrimental situations for children, including war and incarceration. Civil and political rights include the right to a name, nationality and identity. Economic rights include the right to a standard of living adequate for physical and mental development. Social rights ensure access to special services of the "highest attainable standard". Cultural rights include issues pertaining to information, education, leisure and freedom of expression. Among the international human rights instruments, the Convention's approach is unique because of its inclusion of what are traditionally known as first (civil and political), second (socio-economic and cultural) and third generation (right to

⁵¹Philip Alston. "The Best Interests Principle: Towards a reconciliation of culture and human rights," in Alston, ed., The Best Interests of the Child: Reconciling Culture and Human Rights (Oxford: Clarendon Press, 1994), 2.

development, of indigenous peoples) rights. More importantly, it is the first human rights Convention to address all aspects of human development.

The Preamble begins as all other international human rights instrument begin, with the usual statement of accession to the *Universal Declaration of Human Rights* (1948) and its general principles. It is critical to note that the importance of one's culture is emphasized in the Preamble:

THE STATES PARTIES [sic] TO THE PRESENT CONVENTION,
... Taking due account of the importance of the
traditions and cultural values of each people
for the protection and harmonious development
of the child ... Have agreed ...

The first five articles provide an overall framework under which the remaining articles are to be applied.⁵² These five articles pertain to the definition of a child (Article 1), freedom from discrimination (Article 2), the principle of "best interest of the child" (Article 3), state obligations (Article 4) and the Rights and Duties of parents and guardians (Article 5). These articles and the ensuing provisions⁵³ are to ensure the full and

⁵²Alston, 11.

⁵³Article 6 - survival and development; 7/8 - name, nationality and identity; 9 - parental care; 10/11 - family reunification; 12/13 - freedom of expression; 14 - freedom of religion, thought, conscience; 15 - freedom of association; 16 - privacy; 17 - freedom of information; 18 - parental care; 19 - abuse; 20 - protection by the state when separated from families; 21 - adoption;

harmonious development of his and her personality, the growth in a family environment in an atmosphere of happiness, love and understanding.

However, Article 3, the "best interest" principle is the "leading" article of the Convention from which all decisions affecting children are to emanate. As stated in UNICEF⁵⁴ publications regarding the Convention,

The guiding spirit of the Convention, and the basis on which the other provisions must be judged, is that the **best interest of the child** must be a primary consideration in any decision about that child.⁵⁵

Recognizing the reality of the lives of peoples who do not belong to the dominant societies, the Convention includes a separate article for the protection of minority ethnic and indigenous rights,

22 - refugee children; 23 - disabled children; 24 - health; 25 - separation from family; 26 - social security; 27 - standard of living; 28/29 - education; 30 - minority and indigenous rights; 31 - rest and play; 32 - economic exploitation; 33 - substance abuse; 34 - sexual abuse; 35 - abduction and sale of children; 36 - abuse and exploitation; 37 - torture and imprisonment; 38 - armed conflict; 39 - recovery care; 40 - penal justice; 41 - accession to the law of State party or international law more conducive to the rights of the child; 42 - dissemination; 43 implementation and monitoring; 44 - submission reports to Committee; 45 - international cooperation; 46 - ratification; 49 - enforcement of the Convention as law; 50 - amendments; 51 - reservations; 52 - denunciation; 53 - UN as depository of Convention; 54 - language and signatories.

⁵⁴The United Nations Children's Fund was the lead UN agency in the drafting of the Convention. It remains the primary organization in the dissemination, implementation, monitoring and adjudication of the Convention.

⁵⁵Author's emphasis.

Article 30: In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

Further, Article 17, referring to a child's access to information, also includes ethnic minority and indigenous rights: "State Parties shall ... (d) encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous."

The Canadian government was actively involved in the drafting process of the Convention. In 1982, a federal-provincial-territorial working group was established to provide input on the text to the UN drafting committee.⁵⁶ In the mid-1980s, the Assembly of First Nations began a "self-initiated" involvement⁵⁷ in the drafting process which resulted in Canada's ratification of the Convention with two reservations and one statement of understanding. These reservations and the statement, both of which pertain to Article 21, the adoption provision, were in effect

⁵⁶Canadian Council on Children and Youth, "The Convention on the Rights of the Child: Background," Ottawa [photocopy], n.p.

⁵⁷Senior Manager, Assembly of First Nations, Ottawa, telephone interview with the author, 23 May 1996.

inserted at the request of First Nations organizations.⁵⁸ Recognizing the significant negative impact of the adoption process affecting First Nations children which came to light at the same time during the early deliberations of the Convention, the First Nations groups ensured that Article 21 would not end the "customary forms of care" practiced by the First Nations community. Specifically, custom adoption⁵⁹ may not be restricted by Article 21 of the Convention. Further, the statement of understanding allows for the consideration of Article 30 (ethnic and indigenous rights) in "interpreting and applying **all the rights** in the Convention." With the reservation and the statement of understanding, it appears that Canada has made a great effort to ensure that First Nations children 's rights are protected and promoted.

⁵⁸A reservation indicates that a State is not bound by a certain article of the Convention due to a specific domestic situation. A statement of understanding explains how a state interprets a certain article. The Assembly of First Nations, the Native Council of Canada, the Native Women's Association of Canada and the Metis National Council were consulted by the federal government with respect to the reservation and statement of understanding. See Canadian Council on Children and Youth, "The Convention on the Rights of the Child: Backgrounder."

⁵⁹In traditional First Nations philosophy, and unlike the adoption practices of the dominant society, a child is a member of the community, and therefore, the care of a child can and does extend to the community, beyond the nuclear family to which the dominant society is accustomed. Their concept of adoption is much broader, in the sense that, it is not restricted to adoption of children, as in the dominant society. A family may adopt a grandparent, a child may adopt an uncle or an aunt, a man may adopt another brother, and so forth. In Sinclair and Bala, "Aboriginal Child Welfare Laws," 179.

There is much hope for the Convention, as evidenced by its wide acceptance in most countries and its depiction as a "holistic and far-reaching instrument for the protection and development of the child."⁶⁰ Within the Canadian context, First Nations communities welcomed the Convention. The Native Council of Canada, now the Aboriginal Congress of Canada, responsible for both non-status and status off-reserve First Nations reports that

[t]he Convention is a very welcomed development because it gives directions for governments to move in, to explore the current situation of children, to plan responses and to take actions to improve the situation of all children. It also provides indicators against which a government's actions can be assessed.⁶¹

Similarly, the Assembly of First Nations states that

[t]he Convention on the Rights of the Child is a step in the right direction for not only First Nations children but all children in the world who are suffering. First and foremost, the Articles respect the interests, concerns and heritage of First Nations children. The United Articles value their existence.⁶²

⁶⁰Y.N. Kly, "On the Meaning and Significance of the United Nations Convention on the Rights of the Child," Canadian Review of Social Policy 27 (1991): 67.

⁶¹Native Council of Canada, "Report by the Native Council of Canada on Canada's Response to the UN Convention on the Rights of the Child," July 1993 [photocopy], 4.

⁶²Assembly of First Nations, "To Respect the Child, You Must Respect the People: A Study of the Articles of the United Nations Convention on the Rights of the Child," November 1993 [photocopy], 1.

By setting a standard for the treatment of children, the Convention aspires to address injustices and inequities against all children. The question, however, is whether or not the Convention is responsive to the needs of marginalised children, of those living within the periphery of nations as a result of their exclusion from the dominant society.

Because the Convention was recently ratified and promulgated within Canada, there is no precedent upon which one can base an assessment of the appropriateness and effectiveness of the Convention as a human rights instrument to ensure the equality of all children. However, one can examine the inherent conflicts which arise out of international human rights laws. These conflicts render the Convention problematic for those who live in the margins of society, especially the First Nations children of Canada.

Chapter Three

The Origins of International Human Rights Law, Universality and Legal Pluralism

The central argument of this thesis is that the inherent conflicts in international laws render them inappropriate and ineffective as instruments with which to protect the human rights of minorities and indigenous peoples. This chapter will indirectly critique the Convention by identifying these conflicts in international human rights law in general. The focus will remain on the following issues: the differences between the ideology of international human rights laws and the ideology of the First peoples in Canada; universality versus cultural relativity; and legal pluralism. The first involves a discussion of the origins of human rights law, and the opposing worldview of First Nations peoples. The second is a discussion of the age-old discourse on the standardization and normative aspects of international law on one hand, and the relevance of culture, traditions and belief in the interpretation of law on the other. The third will identify the hierarchy of rights and the adversarial nature of rights that ensure the continuation of the status quo of the dominant society.

Origins of International Human Rights Law

Before embarking on the origin of human rights, it is necessary to define human rights as understood by the dominant society. It is important to note that the *Universal Declaration of Human Rights* (1948) and subsequent human rights instruments do not explicitly define human rights. As Louis Henkin describes them, implicit in human rights is a commitment to individual worth.⁶³ The essence of equality derived from personhood is embodied in human rights; it is neither bestowed nor granted by society; rather, all human beings are entitled to human rights for simply being born. Henkin further states that "the idea of human rights is a political idea with moral foundations ... [I]t is an expression of the political relationship that should prevail between individual and society."⁶⁴

⁶³Louis Henkin, "The Universality of the Concept of Human Rights," in Glen Hastedt and Kay Knickrem, eds., Towards the 21st Century: A Reader in World Politics, (Englewood Cliffs, NJ: Prentice Hall, 1994), 369. The UN emphasis on individual rights as a legitimate international concern occurred after World War II. Recognition of the group rights of racial, ethnic, linguistic and religious minorities existed prior to this time. A number of treaties and "minority clauses" under the auspices of the League of Nations were signed, involving countries such as Czechoslovakia, Austria, Greece, Bulgaria, Hungary, Poland, Turkey, Rumania and Yugoslavia. See Gerhard von Glahn, Law Among Nations, 5th ed. (New York: Macmillan Publishing Co., 1986), 179-180.

There is a distinction between ethnic minorities and indigenous minorities, but recognition of group rights will not be explored in this analysis.

⁶⁴Henkin, "The Universality of the Concept of Human Rights," 368.

To understand the essence of human rights and to provide a sense of indeterminacy of these rights, the following six characteristics of human rights are noted by James Nickel:

1. Human rights are rights. Although the meaning is unclear, 'rights' suggest that they are definite and high priority norms whose pursuit is mandatory.
2. They are universal. It [sic] implies that race, sex, religion, social position and nationality are irrelevant to whether one has human rights.
3. Human rights exist independently of recognition or implementation in the customs or legal systems of particular countries.
4. Human rights are important norms, strong enough as normative considerations to prevail in conflicts with contrary national norms and to justify international action on their behalf.
5. Human rights imply duties for both the individuals and governments, despite the fact that international human rights laws are obligation for, among and between states.
6. Human rights establish minimal standards of decent social and governmental practice.⁶⁵

Briefly re-stated, they are universal and normative standards, irrespective of race, sex, religion, class and nationality. Moreover, they are an obligation for, between and among states.

⁶⁵James W. Nickel, Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration on Human Rights (Berkeley: University of California Press, 1987), 3.

Taking into consideration these characteristics of human rights, do the rights under the Convention extend to First Nations children so that, for example, fewer children die at birth or under the age of five? To answer this question, it is necessary to examine the origin of international human rights law and assess its compatibility with First Nations life philosophy.

The contemporary notion of rights is rooted in Anglo-American legal theory. Briefly, the liberal ideology of life, liberty and property, as expounded by John Locke forms the basis of the philosophy of rights. From natural law inheres natural rights of individuals within, what Locke calls, a "political society."⁶⁶ The concept of individual ownership as expressed in property rights necessitated a "political society" to which individuals submitted. More importantly, this political society guaranteed these rights to ownership. The notion of ownership in Locke's theory was "an individual labour-based possession" which legitimized individual acquisition and unlimited appropriation.⁶⁷ The pursuit of enlightenment ideas of progress and development ensured the

⁶⁶James W. Tully, "Rediscovering America: The Two Treatises and Aboriginal rights," in G. A. J. Rogers, ed., Locke's Philosophy: Content and Context (Oxford: Clarendon Press, 1994), 166.

⁶⁷Arthur Dyck J., Rethinking Rights and Responsibilities: The Moral Bonds of Community (Ohio: Pilgrim Press, 1994), 4-5.

strengthening of modern states and modern markets. It also ensured that law among nations reflected the relationship between states and markets. Thus, international law entrenched the notion of individual ownership in the English tradition and a political society closely resembling nation-statehood.

In contradistinction, First peoples of North America, living as they had for millenia, had a different life philosophy. Unlike the dominant European mode of organization, First Nations lacked the state-centered "political society." Further, their idea of ownership was better described as "stewardship." As James Tully explains,

[t]hey were a confederation of nations presided over by an assembly of national chiefs ... Each nation had a clearly demarcated and defended territory, a decision-making body, a consensus-based decision-making procedure and a system of customary laws and kinship relations. Moreover, with respect to property, the territory as a whole belongs to the nation, often women are custodians and jurisdiction over it is held in trust by the chiefs. It is inalienable, and the identity of a nation as a distinct people is inseparable from their relation to and use of the land, animals and entire ecosystem. Although land belongs to them, it is more accurate to say, as the Inuit stress, that they belong to the land.⁶⁸

⁶⁸Tully, 180-181.

The intrinsic connection between land and peoples is an important distinction, because it runs contrary to the principle of rights to ownership. Furthermore, their society based on collective obligations, as distinguished from rights, and consensus decision-making are features which added to Locke's assessment of First Nations society as "uncivilized" and in a "state of nature." As Tully asserts, the social order of First Nations peoples was construed as an historically less developed form of European political organization, and not on par with European political formation.⁶⁹

As Mary-Ellen Turpel explains the difference, "aboriginal cultures are not simply different races - a difference explained in terms of biology (or colour): aboriginal cultures are the manifestations of a different human (collective) imagination." Further, she asserts that the right to private property as the cornerstone of the idea of rights runs contrary to this human imagination. As she explains, "the notion of rights based on individual ownership is antithetical to the widely shared

⁶⁹Tully, 167.

understanding of creation and stewardship responsibilities of First Nations peoples, for the land, or for Mother Earth."⁷⁰

This seeming digression into the origins of rights and First Nations life philosophy may seem, on the surface, irrelevant to contemporary international human rights law. The divergence, however, is significant if one accepts the notion that "systems of laws are devised to suit the types of societies they are intended to support."⁷¹ Contemporary international human rights law, therefore, reflects societies which subscribe to enlightenment ideas of social, political and economic relations. As Nickel explains, "[t]he Universal Declaration of Human Rights replaces Locke's three generic rights - to life, liberty and property - with nearly two dozen specific rights."⁷² Further, it ensured that human rights laws has three distinct features: first, it concerns individual rights and freedoms; second, the organizational structure is the sovereign state. Third, it is an expression of social codes and relations incompatible with First Nations philosophy.

⁷⁰Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter of Rights and Freedoms," Canadian Women's Studies 10, no. 2/3, 150-152.

⁷¹James K. Feibleman, Justice, Law & Culture (Dordrecht: Martinus Nijhoff Publishers, 1985), 63.

⁷²Nickel, Making Sense of Human Rights, 4.

With respect to individual rights and freedoms, Blackburn states that,

[t]he single objective of human rights theory and now of human rights law, has therefore always been to protect weak individuals from the oppression of powerful groups, by giving them inalienable rights which inhere in them as individuals.⁷³

International human rights law, therefore, is linked to the paramountcy of individuals. As Paul Hazard explains,

it [human rights] is linked to cultures in which the importance of the individual is acknowledged and backed by a body of law to which this individual can appeal in defense of his or her rights against other individuals or the State.⁷⁴

The second feature of contemporary international human rights regime is that it is state-centric. The importance of state sovereignty is integral to the notion of human rights. As Falk explains, the prevailing structure and organizational feature is the sovereign state.⁷⁵ While the reasons for postwar development in human rights may have been spurred by the atrocities of war, it

⁷³Robert Blackburn and John Taylor, eds. Human Rights for the 1990s: Legal, Political and Ethical Issues (London: Mansell, 1991), 38.

⁷⁴Olwen Hufton, "Introduction" in Olwen Hufton, ed., Historical Change & Human Rights (New York: Basic Books, 1995), 2.

⁷⁵Richard Falk, "Cultural Foundations for Protection of Human Rights," in Abdullahi An-Naim, ed., Human Rights in Cross Cultural Perspectives: A Quest for Consensus (Philadelphia: University of Pennsylvania Press, 1992), 55.

is also for and about the international system of states. As Sanders explains, three reasons for the interest in and development of contemporary international human rights law are state legitimacy, peace and political stability in the international system, and recognition of transnational actors.⁷⁶ Despite the notion of rights of the individual, human rights are products of states. As we shall see later on in this chapter, this presents a curious situation for those who live on the margins of society.

The third aspect of modern human rights law is that it is an expression and agency of power. The evolution of "customary norms" to a codified form elevates relations to "an aspect of political power." It then becomes an expression of power because it is couched in terms of rights and freedoms, and as Carol Smart explains, gives the impression of extending 'rights,' not creating wrongs.⁷⁷ As an example of this, the notion of life, liberty and property justified slavery in America in the face of human rights documents such as the American Declaration of Independence and Bill of Rights. Similarly, the same concepts justified the European

⁷⁶Sanders, "International Human Rights Law, Spring 1996," IA-A-2.

⁷⁷Carol Smart, Feminism and the Power of Law (New York: Routledge, 1989), 142.

colonization and dispossession of Indians in American 'terra nullius' centuries ago.⁷⁸ As Maureen Davies explains,

[t]raditionally, Aboriginal Peoples have been considered to be the objects rather than the subjects of international law. European powers were directly responsible for the content and direction of this facet of law and it is therefore not suprising that the interests of Aboriginal Peoples have not found adequate representation and protection at this level.⁷⁹

Universality versus Relativity

The normative aspects of international law dictate a specific character of human rights laws: they are universal and neutral in application. This universalist value consideration dates back to Roman times when Cicero (106-43 BC) stated that "true law is right reason, in agreement with nature; it is of universal application, unchanging and everlasting ... justice is one; it binds all society, and is based on one law."⁸⁰ In the same vein, all human rights documents begin with the emphasis that all human beings are

⁷⁸Tully, "Rediscovering America," 174.

⁷⁹Maureen Davies, "Aspects of Aboriginal Rights in International Law," in Bradford W. Morse, ed., Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada, rev 1st ed. (Ottawa: Carleton University Press, 1991), 43.

⁸⁰Paul R. Viotti and Mark V. Kauppi, eds., International Relations Theory (New York: Macmillan Publishing Co., 1993), 533.

entitled to the same rights and freedoms without distinction of any kind. Moreover, these rights and freedoms "must be uniform in different applications."⁸¹

The debate over the universality, uniformity and neutrality of international law is irresolvable inasmuch as the outcome depends on the perspective through which one chooses to see the world. As Philip Alston comments,

[a]t a certain level, the debate over the nature of the relationship between international or 'universal' human rights standards and different cultural perspectives and context can never be resolved. Thus, the very aspiration to achieve acceptance of certain universal standards invites continuing controversy and provokes the assertion of relativistic positions.⁸²

Cultural relativists argue that the absence of contextual diversity in international human rights instruments is superfluous and ineffective at best and is supportive of the status quo at worst. Paul Carrington, in a vociferous argument against the universalist tendency of international law, states the following:

Lengthening the lists of human rights or principles of natural law is a form of non-violent imperialism, depriving as it does the choice of social arrangements

⁸¹Carlos Santiago Nino, The Ethics of Human Rights (Clarendon Press, Oxford, 1991), 30.

⁸²Alston, "The Best Interests Principle," 16.

open to a self-governing state or community.⁸³

Further, this 'pursuit of the single truth' evident in universality and neutrality constitutes, he argues, "the one great theoretical design for positive law (might we call it justice?) that will best advance our increasingly unified human condition."⁸⁴ He asserts, as an example of this pursuit of the single truth, that the *Universal Declaration of Human Rights* (1948) constitutes "a proclamation that the whole world should resemble as nearly as possible suburban middle class America."⁸⁵ Similarly, An-Na'im states that

normative universality in human rights, including the rights of the child, should neither be taken for granted nor achieved through the "universalization" of the norms and institutions of dominant cultures, whether at the local, regional or international levels.⁸⁶

The debate over the generalist nature of international human rights laws and the absence of specificity elicits the following

⁸³Paul D. Carrington, "Aftermath," in P. Cane and J. Stapleton, eds., Essays for Patrick Atiyah (Clarendon Press: Oxford, 1991), 114.

⁸⁴Carrington, 114.

⁸⁵Carrington, 114.

⁸⁶An-Na'im, "Cultural Transformation and Normative Consensus on the Best Interests of the Child," in Alston, ed. The Best Interests of the Child, 62.

question: What exactly is omitted from this discourse? It omits the interplay of forces such as ethnicity, class and gender vis-a-vis dominant social, political and economic structures. The distinct omission of ethnicity, class and gender perspectives in legal instruments renders a homogeneous perspective to heterogeneous situations. The notion of empowering all peoples equally because individuals are subject to the same laws and these laws guarantee due process equally is simplistic and arguably false. The 'objectification' in the name of universality, neutrality and uniformity, or the lack of 'subject positioning', negates the reality of difference between the dominant race, class and gender, and that of the minority. As Catherine Mackinnon argues, "[I]n reality begins principle ... [B]ehind all law is someone's story - someone whose blood if you read closely, leaks through the lines. Text does not beget text; life does."⁸⁷

Essentially, international human rights instruments do not take into account power relations between rich and poor, male and female, 'coloured' and 'white' races. For those who do not belong to the dominant society, the implications are great. As Patricia Williams states,

⁸⁷Catherine Mackinnon, "Crimes of War, Crimes of Peace," in Stephen Shute and Susan Hurley, eds., On Human Rights, 83.

[l]aw and legal writing aspire to formalized, color-blind, liberal ideals ... Neutrality is the standard for assuring these ideals, yet the adherence to it is often determined by reference to an aesthetic of uniformity in which difference is simply omitted ... race neutrality in law has become the presumed antidote for race bias in real life.⁸⁸

While Williams' analysis refers to 'race,' it is nonetheless interchangeable with a class and gender analysis. To omit distinctions of race, class and gender variables is to misconstrue the reality of power relations in society. The universal and neutral quality of international human rights laws ensures, therefore, that individuals requiring the most significant guarantee are offered the least protection. To explain this anomaly, Diane Bell states that

[t]he impetus to universalize glossed over differences in a way that, it could be argued has been an impediment to its realization, and that partly explains the reluctance of certain states to implement it or, once they have adopted it, explains the lack of success in achieving its goals.⁸⁹

The universal normative considerations of international human rights laws emphasize sameness and gloss over difference. An-na'im

⁸⁸Patricia J. Williams, The Alchemy of Race and Rights (Cambridge: Harvard University Press, 1991), 85.

⁸⁹Diane Bell, "Considering Gender: Are Human Rights for Women, Too?" in An'Naim, ed., Human Rights in Cross-Cultural Perspectives, 354.

questions this principle in asking "by whose criteria or according to which philosophical framework can the universality of the norms in question be declared or verified?"⁹⁰

While many minorities (racial minorities, women, homosexuals) seek equality and protection from discrimination, indigenous peoples seek recognition and protection of their cultural distinctiveness.⁹¹ Unfortunately for First Nations, normative considerations of international human rights law encourage and endorse sameness more than they reflect the politics of difference.

Legal Pluralism

This section focuses on the third aspect which hinders international human rights laws from protecting the rights of First Nations children: legal pluralism. The plurality of legal codes exists at two levels: one on the hierarchy of laws within the international human rights framework; the other, on the competing and adversarial rights within a particular law. As Farida Shaheed explained in her discourse on law and Muslim women, "in any given

⁹⁰An-Na'im, "Cultural Transformation," 66.

⁹¹Sanders, "International Human Rights Law, Spring 1996," M-A-1, 11.

context, a plurality of laws exist in a hierarchy."⁹² This hierarchy is evident in the approximately twenty-one international human rights instruments upon which a person can base a claim.⁹³ First and presumably foremost of these human rights codes is the *Universal Declaration of Human Rights* (1948). Subsequent Conventions include the *International Covenant on Economic and Social and Cultural Rights* (1966), the *International Convention on Civil and Political Rights* (1966), the *International Convention on the Elimination of all Forms of Racial Discrimination* (1966), and so forth.⁹⁴ These Conventions, which all accede to the *Universal Declaration of Human Rights*, are to create the conditions for just and equal treatment of individuals in all aspects of society.

However, in the case of the protection of the rights of children, this plurality has been presumed to be avoided, since, as mentioned earlier, the Convention is the most comprehensive human rights instrument thus far, avoiding various 'generations' of rights in one document. As Lawrence LeBlanc explains,

⁹²Farida Shaheed, "Controlled or Autonomous," Signs: Journal of Women in Culture and Society 19 (1994), 1005.

⁹³James W. Zion, "North American Indian Perspectives on Human Rights," in An-Na'im, Human Rights, 192.

⁹⁴For a list of basic documents, see Ian Brownlie, ed., Basic Documents on Human Rights, 3d. ed. (Oxford: Clarendon Press, 1993).

[t]raditionally, human rights have been thought of in terms of two principal categories: civil and political rights; and economic, social and cultural rights ... [T]he substantive articles of the Convention on the Rights of the Child reflect this "new" way of thinking because they affirm a broad range of civil, political, economic, social and cultural rights while making no formal distinction among them.⁹⁵

What is crucial, however, is the notion of 'competing rights' arising out of binary opposites within legal doctrines. As Barbara Johnson explains, "[b]ecause rights are categorical, they often come in contradictory pairs."⁹⁶ Thus, the right of one, is the loss of right for another. For example, in human rights law, contradictory rights arise between state rights and individual rights, between individual rights and group (collective) rights, between the right to autonomy and the right to be cared for, between the right to self-determination and the right to cultural belonging.

To illustrate the this hierarchy of rights, perhaps it is best to begin with the binary opposition of state rights and individual rights. The paramount principle of international human rights laws

⁹⁵Lawrence Leblanc, The Convention on the Rights of the Child: United Nations Lawmaking on Human Rights (Lincoln: University of Nebraska Press, 1995), xvii.

⁹⁶Barbara Johnson, "Introduction," in Barbara Johnson, ed., Freedom and Interpretation (New York, Basic Books, 1993), 7.

which have emerged from the European state system is that they are obligations among states. Because signatories to public international law are states, the 'contract' is not between the international community and the individual; it is for, among and between states. Further, because of the absence of a supranational legal enforcement mechanism, the only deterrent to violation of human rights is the signatory states' obligation to other states. Gerhard von Glahn explains that "as yet, it is the state that possesses an international legal right, not the individual."⁹⁷ This presents a curious anomaly. As Mackinnon explains, "states are the only ones recognized as violating human rights, yet states are the only ones empowered to redress them."⁹⁸ Therefore, the fulfilment of individual rights rests with a states' moral commitment to fulfil those rights.

This poses a difficult problem because the definition of a moral obligation of state rests in the hands of the powerful few. Because states, as subjects of international law, are self-determining and self-governing, how the state treats its citizens is subject to domestic policy made of the national interest as

⁹⁷Gerhard von Glahn, Law Among Nations, 6th ed. (Toronto: Maxwell Macmillan Canada, 1992), 249.

⁹⁸MacKinnon, "Crimes of War, Crimes of Peace," 93.

defined by the state. Inasmuch as the state machinery is to protect the individual, inaccessibility to this protection due to differing conceptual and experiential power relations between state and individuals renders the protection ineffective. One simply has to look at the gross human rights violations in all corners of the world, especially against women and children, that go unabated to understand the weakness of the system. As Jack Donnelly argues, "[P]ublic international law and international organizations are products of states, not of a cosmopolitan world community. They are instruments of, not alternative to, States."⁹⁹

First Nations peoples are doubly-bound because of the systemic adversarial position of States and individuals, and their distance as colonised minorities from the state machinery. In explaining this dilemma, Falk states that

... to the extent that international law of human rights is an exclusive result of the States system, it cannot hope to take into account of the values and needs of peoples that are not adequately represented in that system or even constituted to qualify for membership.¹⁰⁰

⁹⁹Jack Donnelly, "Third Generation Rights," in Catherine Brolmann, Rene Lefebvre and Marjoleine Zieck, eds. Peoples and Minorities in International Law (Dordrecht: Martinus Nijhoff Publishers, 1993), 145.

¹⁰⁰Falk, "Cultural Foundations for the International Protection of Human Rights," 48.

In addition, he claims that exclusion from the rights forming process is a denial of human rights, inasmuch as the protection offered is in an oblique and obscure manner, and that those excluded are likely to be taken into account (if at all) in a partial and paternalistic manner.¹⁰¹

Another binary opposition is that of the individual versus group (collective) rights. This problem is especially acute for ethnic minorities and indigenous peoples as their peoples struggle for recognition of their rights as a collective in Canada and the world over. Rhoda Howard claims that indigenous groups want recognition of collective rights, moreso than individual rights:

... they are interested in the recognition of their collective dignity, in the acknowledgement of the value of their collective way of life as opposed to the way of life of the dominant society into which they are unequally integrated.¹⁰²

Notwithstanding the indigenous struggles for self-determination and self-governance, the distinction between individual rights and groups rights is important. This presents a binary opposition between individual and collective rights, which begs the question, which comes first? Natan Lerner states that while "the individual

¹⁰¹Falk, 47.

¹⁰²Rhoda Howard, "Dignity, Community and Human Rights," in An-Na'im, ed., Human Rights in Cross Cultural Perspectives, 84.

is the object of protection in these [group rights cases], the fundamental element is the group."¹⁰³ This presents a clear case of competing rights; for First Nations, it is often under the rubric of group rights that their rights to their own cultural expression and cultural belonging are upheld. Most international human rights laws acknowledge the right to belong to an ethnic community without acknowledging the right of that community to self-determination. By this action, the international community again recognizes the rights of peoples to self-determination most closely linked with an independent state. This means, as Shaheed explains,

[t]hat law therefore flows from the social relations it seeks to codify and -- by both prescription and prohibition -- projects an ideal for society and demarcates the boundaries within which persons are free to act, including the limits within which they must formulate both a collective and individual identity.¹⁰⁴

Johnson argues that "[N]othing in the concept of rights can negotiate the conflict that arises out of [such] binary opposites."¹⁰⁵

¹⁰³Natan Lerner, Group Rights and Discrimination in International Law (Dordrecht: Martinus Nijhoff Publishers, 1990, 31.

¹⁰⁴Shaheed, "Controlled or Autonomous," 1012.

¹⁰⁵Johnson, "Introduction," 7.

The Sandra Lovelace Case

This case succinctly illustrates the dilemma which faces First Nations peoples as it captures the pressures emanating from the origin of international human rights law, the universality of these laws and the plurality of legal codes.

Sandra Lovelace, a Maliseet from Tobique, New Brunswick, lost her Indian status (that is, registration as an Indian with the Canadian state) upon marriage to a non-Indian man. Section 12(1)(b) of the *Indian Act* (1951) stated that,

The following persons are not entitled to be registered namely, ... (b) a woman who married a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in section 11.

After losing status upon marriage to a non-Indian, Lovelace was unable to return to her community in Tobique reserve upon the dissolution of her marriage. With respect to sexual discrimination in the *Indian Act*, the Supreme Court of Canada ruled in 1973 (Attorney General v. Lavell and Isaac et al. v. Bedard) that the *Indian Act* was exempt from, and in fact, superceded the Canadian Bill of Rights. This ruling left Lovelace no other domestic legal recourse. From this premise, Lovelace applied to the International Human Rights Commission (the Commission) in 1977 to address the issue of sexual discrimination in the *Indian Act*. In 1981, the

Commission ruled that the government of Canada breached the *International Covenant on Civil and Political Rights*, as ratified by Canada in 1976. Specifically, Canada, through the *Indian Act*, violated her right to reside in the reserve, as stipulated in Article 27:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied by the right, in community with the other members of group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.¹⁰⁶

The Commission elided the issue of gender-based discrimination in the *Indian Act* by citing that Lovelace had lost her status upon marriage in 1970, six years prior to Canada's ratification of the Covenant in 1976. It stated that, "as regards Canada, it can only consider alleged violations of human rights occurring on or after 19 August 1976."¹⁰⁷ The Commission's decision addressing Lovelace's cultural rights over sexual rights led Lillian Krossenbrink-Gelissen to ask, "which rights come first? Femaleness or ancestry?"¹⁰⁸

¹⁰⁶United Nations Human Rights Committee. *Lovelace v. Canada*. as excerpted in Sanders, "International Human Rights Laws, Spring 1996," A-C-7, 76.

¹⁰⁷United Nations Human Rights Committee, A-C-1, 69-70.

¹⁰⁸Lilliane Krossenbrink-Gelissen, Sexual Equality as an Aboriginal Right (Saarbrücken: Verlag breitenback Publishers, 1991), 111.

While this landmark case was a catalyst for an amendment in the Indian Act in 1985, it nonetheless illustrates that the international human rights regime is inappropriate and ineffective in upholding Lovelace's birthright to equality. First, the Commission did not address the issue of sex discrimination. Second, while Sanders states that "[t]he story of the Lovelace case is beloved at the United Nations, for it is seen as proving that the individual communications system under the Covenant can work,"¹⁰⁹ he questions the role of the decision in the Canadian government's amendment.¹¹⁰ During the 1970s and 1980s, First Nations women's organizations brought the issue of sexual discrimination in the *Indian Act* to the forefront of politics of First Nations/non-First nations relations, and it subsequently became a major political issue in Canada.¹¹¹ Third, while the amendment, Bill C-31, in principle reinstated women who had lost their status due to marriage, discrimination has now been passed on to the "second generation", that is, to the offspring of unions of status and non-

¹⁰⁹Sanders, "Developing a Modern International Law, Spring 1996" A-B-4.

¹¹⁰Sanders, A-B-4.

¹¹¹Sanders, A-B-4.

status First Nations.¹¹² Neither the Commission nor the Canadian government through Bill C-31, attempted to eliminate sex discrimination. I suggest that the exclusion of First Nations female voices in the construct of international law, the commitment to universality in the international regime and the configuration of adversarial rights contributed to the denial of Lovelace's birthright.

It is ironic that the international community upheld Lovelace's right to a collective identity which the Canadian government has as yet failed to recognize *de facto*, despite the entrenchment of aboriginal rights in Section 35 of the Constitution. The fact that First Nations women have a legislated identity, apart from a negative, socially constructed identity by the dominant society in Canada, in the face of international human rights laws points to the fact that ancestry indeed supercedes femaleness. Clearly, Lovelace was attempting to assert her human rights in a system of law that is ill-equipped to deal with unjust treatment stemming from inequitable gender, class and ethnic relations. This is where Lovelace's case relates to First Nations children.

¹¹²For a detailed explanation, see Native Women's Association of Canada, Guide to Bill C-31: An explanation of the 1985 amendment (Ottawa: NWAC, 1986).

The Lovelace case was as much an issue of ethnicity and class as it was of gender. I suggest that the implications of the Convention on First Nations children are the same as those raised in the Lovelace Case. While the implications are the same, the effect is greater because First Nations children, as all children, require a voice to speak for them, and are physiologically, emotionally and spiritually dependent on caregivers until adulthood. However, unlike other children, First Nations children are at greater risk precisely because of these implications.

To recapitulate, this chapter examined three foundational aspects of international human rights law: the origin, the universality and the plurality of legal codes. From this examination, there is a distinct feature of international human rights law that hinders the protection of First Nations peoples, as supported by the Lovelace case. International human rights law is an expression and an agency of power. Owing to its enlightenment roots, it is an expression of power in that it speaks of the interests of the dominant society. Or, as Nickel comments with respect to the *Universal Declaration of Human Rights*, it is an attempt to "set forth the norms that exist within enlightened

morality." ¹¹³ Moreover, although it purports to be a universal, neutral and uniform arbiter, it is an agency of power because the system can deny, withhold or contravene rights by virtue of its expression. There is an underlying assumption of unity of society and nation that serves to obscure material relations of conflict and oppression. ¹¹⁴ Further, the unity expressed in human rights instruments oversimplifies complex power relations, meaning that the "acquisition of rights in a given area may create the impression that a power difference has been resolved." ¹¹⁵

What might this mean for a First Nations child? The next chapter will critique the Convention on the basis of these troubling theoretical foundations.

¹¹³Nickel, Making Sense of Human Rights, 1987.

¹¹⁴Marlee Kline, "Child Welfare Law, Best Interests of the Child Ideology and First Nations," Osgoode Hall Law Journal 30, 2 (1992), 415.

¹¹⁵Smart, Feminism and the Power of Law, 144.

Chapter Four

In Whose Best Interest?

There is another United Nations (UN) treaty ... that specifically protects the rights of the indigenous child. It is a human rights treaty known as the Convention on the Rights of the Child.¹¹⁶

Since the UN's adoption of the Convention and Canada's subsequent ratification are recent occurrences, it is perhaps premature to assess empirically the effectiveness of the Convention. In this section, I take issue with Cynthia Price Cohen's endorsement quoted above and examine the practical implications of the Convention on First Nations children. Using the previous chapter's arguments as the basis for the following critique of the Convention, this section identifies anticipated sites of conflict and contradictory positions in which First

¹¹⁶Cynthia Price Cohen, "Rights of the Indigenous Child," St. Thomas Law Review 7, 3 (1995): 558. Cohen participated in the drafting of the Convention from 1983 to 1989. Her support of the Convention as it applies to Native American children is evident in this article. She states that "... this treaty protects the rights of the indigenous child in many ways - by respecting the child's cultural heritage and also by supporting a standard of living that includes health and education. It is to the benefit of Indian children for the United States to ratify this treaty." (p. 566)

Nations children find themselves trapped - a consequence not of their own making since, as illustrated by the preceding chapter, they reside furthest from the structure of international law. As the jurisprudence of children's rights is still nascent in the international community, this critique raises questions more than it seeks to resolve issues.

In the broadest sense, the primary problem arises from the duplication and overlap in the international human rights system. As Sanders asserts, the situation of indigenous people in Canada can be discussed in various treaty bodies under six core treaties.¹¹⁷ Because Canada has signed all core treaties, First Nations children as claimants of rights can be argued in light of these treaties, and not necessarily vis-a-vis the Convention alone.

Further, the Convention, though it is purportedly designed to protect individual rights, lacks an Optional Protocol, a mechanism through which an individual can access international human rights laws. According to Sanders, an Optional Protocol "allows

¹¹⁷He states that there are now six core international human rights treaties which have come into effect since 1966: *The International Covenant on Civil and Political Rights*; *International Covenant on Economic, Social and Cultural Rights*; *International Covenant on the Elimination of All Forms of Racial Discrimination*; *International Covenant on the Elimination of All Forms of Discrimination Against Women*; the *Convention on the Rights of the Child*; and the *Convention against Torture*. Sanders, "Developing a Modern International Law on the Rights of Indigenous Peoples, a report for the Royal Commission on Aboriginal Peoples, December, 1994," in Sanders, "International Human Rights Law, Spring 1996," IA-A-4, 4-5.

individuals to take cases to the [International Human Rights] Committee for adjudication, after the exhaustion of reasonable domestic remedies."¹¹⁸ The lack of an Optional Protocol is a serious omission. States party to the Convention accept that they are "legally accountable for their actions towards children,"¹¹⁹ yet despite the encouragement of Amnesty International during the drafting process, there is no provision for either inter-State or individual petition.¹²⁰ Instead, the Convention relies on periodic State monitoring reports as the enforcement mechanism. In speaking of human rights, Mackinnon states that "[e]nforcement is mainly through reporting, meaning moral force, meaning effective noneforcement."¹²¹

The uselessness of the Convention in international jurisprudence is illustrated by the recent case of Daniela Wilner,¹²² a child born in Canada to Argentine parents. Locked in a custody battle between two continents, her father, Eduardo Mario

¹¹⁸Sanders, A-B-3.

¹¹⁹Rose D'Sa, "The United Nations Convention on the Rights of the Child," Commonwealth Law Bulletin 19, 3 (July 1993): 1274.

¹²⁰Rose D'Sa, 1275.

¹²¹Mackinnon, "Crimes of War, Crimes of Peace," 97.

¹²²Mark Bellis, "Mom fights to regain daughter," Toronto Star 05 July 1995, A20. See also *de Wilner v. Wilner* [1996] O.J. 670 (Ont. Ct. of Justice).

Wilner, applied to the International Human Rights Commission under the *Hague Convention on the Civil Aspects on the Abduction of Children* (1980) to facilitate Daniela's return to Canada. Despite the extensive provisions of the Convention, parties acting "on behalf of" Daniela did not have access to these provisions.¹²³

Remaining within the global perspective, another crucial issue is the recognition of the rights of indigenous children. As previously stated, Article 30 recognizes "cultural" minorities, including indigenous peoples. While most of the encoded rights are stated in positive terms, such as the right to a name and nationality (Article 7), the right to freedom of expression (Article 13), and so forth, Article 30 is stated in negative terms:

... a child belonging to such a minority
or who is indigenous **shall not be denied**
the right ...¹²⁴

This is not a minor point. As Manfred Nowak explained in a critique of a parallel article in the *International Covenant on Civil and Political Rights*,

[s]ince Article 27 of the Political Covenant

¹²³The Commission ruled that the child be returned to Canada, which the Supreme Court of Argentina upheld. Whether or not the decision is in Daniela's "best interest" is beyond the scope of this paper. However, the case illustrates that despite its designation as a "core" treaty, the Convention cannot be invoked in the international court.

¹²⁴Highlighted text is author's emphasis.

is phrased with the typically negative formulation that members of minorities "shall not be denied" certain rights, positive state obligations to affirmative action ... cannot be inferred from this provision.¹²⁵

Similarly, Sanders states that "it [Article 27] does not describe a positive obligation on the State to ensure conditions that will permit cultural minorities to survive and develop."¹²⁶

Notwithstanding the problem areas discussed above, the more crucial issue pertaining to First Nations children is that the protection and promotion of children's rights depend entirely on the State's commitment to children. For First Nations children, this is highly problematic because of competing discourses within the State.

In the first instance, representation is the foremost site of struggle for First Nations children. Who speaks for them? The nature of discourses changes depending on whether it is the federal government, ministerial bureaucracies, child-serving agencies, individuals or collectives who put forth children's concerns. For

¹²⁵Manfred Nowak, "The Evolution of Minority Rights in International Law, Comments" in Catherine Brolmann, Rene Lefeber, Marjoleine Zieck, eds., Peoples and Minorities in International Law (Dordrecht: Martinus Nijhoff Publishers, 1993), 109.

¹²⁶Sanders, "Developing a Modern International Law," in "International Human Rights Law, Spring 1996," M-A-1, 11.

centuries, child advocacy has either excluded the voices of First Nations children or presented them in a manner which excluded the reality of their experiences. Discourses of advocacy and charity, whether by the State or by individuals and collectives, have had deleterious results for First Nations children. Residential schools, child apprehension, adoption policies, exclusive child-service delivery have all contributed to the abysmal status of First Nations children presented in the earlier chapter. Misrepresentation of what is in the "best interest" of a First Nations child has and will continue to pose grave dangers.

D'sa asserts that the Convention "could become relevant where it would be most effective -- in national courts."¹²⁷ She argues that there is scope for referring to extrinsic materials such as international human rights laws in domestic proceedings.¹²⁸ The history of domestic litigation for First Nations, especially with respect to children, has been detrimental. As Bradford Morse claims, social policies, provincial family legislation and the

¹²⁷Rose D'Sa, "The United Nations Convention on the Rights of the Child," 1281.

¹²⁸D'Sa, 1281.

actions of the judiciary are largely to blame for the destabilization of native families and communities.¹²⁹

Competing discourses with respect to First Nations cases essentially reflect the divergence of laws between First Nations and the dominant society, between the unwritten customary laws of First Nations, the Canadian Constitution and the Charter of Rights and Freedoms. Whereas the dominant society speaks of rights achievable through litigation, First Nations rely on consensus on social responsibilities:

Our Nations developed consensus on social responsibilities, and traditions for affirming that consensus. Social consensus is based upon a shared agreement of individuals to exercise a variety of responsibilities.¹³⁰

Taking into consideration these divergent laws, Morse asserts that

[t]he courts, the statutes and the policies all tend to reflect a common perception, that is, that the native people ... are unable to meet adequately their own family needs through their own policies, programs, and laws.¹³¹

¹²⁹Bradford W. Morse, "Indian and Inuit Family Law and the Canadian Legal System," American Indian Law Review 8, 2 (1980), 199.

¹³⁰Community Panel, Family and Children's Services Legislation Review in B.C., Liberating our Children, 7.

¹³¹Morse, "Indian and Inuit Family Law and the Canadian Legal System," 199. For further discussion, see works by Mary-Ellen Turpel and Marlee Kline.

Recourse to domestic litigation questions the very essence of a First Nations child. Will she or he be treated as an individual irrespective of ethnicity, class and gender, or as a member of a collective struggling to forge an identity as a separate and distinct nation? This is a paramount question which illustrates the complexity of issues pertaining to First Nations children. On one hand, it is the right to belong to an ethnic community that provides a better chance of ensuring that a First Nations child's needs are met. On the other, what of individual rights, which are the central tenet of human rights? As Howard asserts, some rights need to be fulfilled as precondition for the exercise of other rights.¹³² In this case, the rights of a First Nations child to proper shelter, food, health care, and so forth, depend on her/his belonging to an ethnic community. She strongly argues that "human (individual) rights and collective rights are incompatible."¹³³ Further, she states that,

[t]he assertion of collective, community or people's rights does not simply mean an extra right of individuals to belong to intact communities that embody their own cultural identity. Such assertion

¹³²Howard, "Dignity, Community and Human Rights," 96.

¹³³Howard, 99.

also can, and frequently does, mean violation of individual rights.¹³⁴

Because First Nations children's identity is tied to the collective, will assertions of individual First Nations children's rights threaten the identity of the collective?

First Nations communities have deemed that assertion of individual rights through access to the dominant legal system prejudices their position because it undermines their ethnicity.¹³⁵ Claiming individual rights in dominant courts, according to Turpel, "is particularly threatening, perhaps even ethnocidal, to Aboriginal Peoples who are on the brink of cultural destruction because of the legacy of colonialism and paternalism under the *Indian Act*."¹³⁶ First Nations children then are entrapped, not only by the dominant society, but also by their own communities. There is even the danger that because children cannot speak for themselves and therefore rely on their communities to voice their

¹³⁴Howard, 97.

¹³⁵This conflict between individual and collective rights was illustrated in the recent Constitutional talks in which the voices of First Nations women were excluded. In direct opposition to the Assembly of First Nations, the Native Women's Association of Canada and other women's organizations appealed to the court to secure a voice in the Constitutional reform talks.

¹³⁶Mary Ellen Turpel, as quoted in Jo-Anne Fiske, "The Womb is to the Nation as the Heart is to the Body," Paper presented to the XIII World Congress of Sociology, International Sociology Association, Bielefeld, Germany, July 18-23, July 18-23, 1994.

needs, their concerns will be subordinated to the struggle of First Nations communities for self-determination. To a lesser degree it can be argued that this situation has already occurred. As Shridhar Sharma states, "the child welfare issue has not been a priority amongst the federal Parliamentarians and Indian leaders and thus a change in child welfare legislation is long time coming."¹³⁷

Possibly the most detrimental character of the Convention is the totalizing theory of universality of rights. That First Nations children will be treated as if they were equal, and as if their lived experiences were the same as any child in Canada invalidates the social, economic and political environment in which they exist. In effect, universality "disqualifies alternative accounts of social reality."¹³⁸ Frances Olsen states that "the

¹³⁷As quoted in Samuel Bull, "The Special Case of the Native Child," 523. With this citation, I do not mean to undermine the efforts of First Nations communities to gain control of child service delivery. To be sure, since the early 1980s, First Nations communities have assiduously worked with the Canadian judiciary to wrest control of child welfare services. Beginning with the Spallumcheen Band in 1989, two-thirds of bands in Canada have now entered into tri-partite agreements between the Band, the provincial and federal governments, to assume responsibility of child welfare services. See Sinclair and Bala, "Aboriginal Child Welfare Laws," 186-188. Despite the divestment of control, First Nations children continue to be caught in jurisdictional disputes, problems arising from insufficient funds, transfer of payment and egregious bureaucratic reporting procedures. (This is anecdotal evidence from a Child Protection Worker employed by the B.C. Ministry of Social Services.)

¹³⁸Smart, Feminism and the Power of Law, 4.

claim of unsituatedness is made by and on behalf of those with power."¹³⁹ Further, she boldly asserts that "to the extent the Convention deals with children as unspecified, unsituated people, it tends in fact to deal with white, male, relatively privileged children."¹⁴⁰ In essence, these "false universalisms" create a myth of rights for First Nations children.

To substantiate the foregoing discussion, I will now point to specific Articles and relate them to First Nations children. Cohen suggests that "the essence of law exists in its interpretation and application" and that the Convention "is written in the language of a constitutive instrument, meaning that it is intentionally inexplicit and amenable to interpretation."¹⁴¹ My question is, how amenable will the interpretation of the dominant society be to a First Nations child?

For example, Article 2 states that a child is entitled to the rights set forth in the Convention "without discrimination of any kind." The colonial history of First Nations peoples attests to

¹³⁹Frances Olsen, "Children's Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child," International Journal of Law and the Family 6 (1992), 195.

¹⁴⁰Olsen, 195.

¹⁴¹Cohen, "Rights of the Child," 5.

the principle of discrimination based on ethnicity, as discussed in chapter two.

Article 3 stipulates that in all actions concerning children, the best interests of the child shall be a primary consideration -- this is the guiding principle of the Convention. Alston concedes that there is considerable potential for Article 3 to be invoked in deference of cultural practices which are compatible with children's rights norms of the dominant society.¹⁴² As evidence, he cites a case study of First Nations children which

surveyed the extent to which the principle was applied by the Canadian judiciary to present a consistent preference in favour of "the apprehension and placement of First Nations children away from their families and communities as natural, necessary and legitimate, rather than coercive and destructive."¹⁴³

Wotherspoon and Satzewich also question the "best interest" principle:

Ultimately, the move to establish child welfare practices "in the best interests of the child" continues to leave unanswered questions about who is defining and directing those interests, and to what end.¹⁴⁴

¹⁴²Alston, "Reconciling the Best Interest of the Child," 21.

¹⁴³Alston, 21.

¹⁴⁴Wotherspoon and Satzewich, First Nations, 94.

Article 8 provides the right to preserve a child's identity, including nationality, name and family relations. Identity is not a simple matter of biological identity or citizenship. To a First Nations child it is particularly complex. Are they girls and boys, daughters and sons of their biological parents, adoptive daughters and sons of grandparents, aunts, uncles or "Houses," Canadian citizens, or members of their respective Nations? At birth, they are accorded a legislated identity through Status registration which does not ensure the protection or the promotion of their rights.

Under entitlement to care, Articles 24 (Health), 27 (Standard of Living), 28 (Education), and so forth are designed to meet children's basic needs. Standards of care designed by and for European Canadian children continue to marginalize First Nations children. Why should they not be so if they are designed to be intolerant of difference?

The Canadian government signed the Convention with a reservation with respect to adoptions (Article 21). The reservation ensures that "customary forms of care" of First Nations communities are not restricted by Article 21. While this reservation was a form of "protection" sought by First Nations groups during the drafting process, the phrase "customary forms of care" is not

explicitly defined. This apparent victory for First Nations might prove otherwise in that it leaves the decision to define what is customary to the dominant judicial process. On one hand, adopting and enforcing customary law accedes to the rights of First Nations to identify and govern their own social relations; on the other hand, it forces them to rely on legal processes to define what is customary for them.¹⁴⁵ Codifying customs, as Goonesekere argues, may not reflect community traditions; instead, they may become products of misinterpretation or imposition of judicial perception.¹⁴⁶

What further complicates the interpretation of customary forms of care and, for that matter, First Nations customary laws, is the reliance of First Nations on oral histories and oral tradition. The dominant courts, relying on written principles, will have difficulty establishing practice from oral histories and traditions. Moreover, the system of legal precedents precludes the understanding and acceptance of "lived relationships" which inform First Nations customary laws. Lived relationships refer to the

¹⁴⁵For further discussion, see Jo-Anne Fiske, "The Supreme Law and the Grand Law," *BC Studies*, 105-16 (1995), 183-199.

¹⁴⁶Goonesekere, "Women's Rights & Children's Rights," 27.

moral, emotional, and social relationships that are intrinsic to the legal code of obligations in First Nations communities.

Finally, Article 42 states that "States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike." However, Teresa Nahanee asserts that "Canada has made no effort to inform aboriginal children or their parents on the rights guaranteed under the Convention on the Rights of the Child."¹⁴⁷ The Metis National Council also states that "our Metis citizens have not been informed about the Convention or its contents because there has not been on-going communication between the federal government and the Metis."¹⁴⁸ Regrettably, I have yet to find any evidence with which to dispute this claim.

While I have examined but several of the fifty four articles, the Convention appears to fall short of empowering First Nations children, even though the international community may have been genuine in its intention. The Convention symbolizes "two distinct doctrines of person" - one which requires the construction of a

¹⁴⁷Native Women's Association of Canada, "Aboriginal Children's Rights: 1993 NWAC Report on the Convention on the Rights of the Child," June 1993 [photocopy], Ottawa, 76.

¹⁴⁸Metis National Council. "Metis National Council Report on the United Nations Convention on the Rights of the Child," June 1993 [photocopy], 2.

First Nations identity, beyond the exigencies of the State, for empowerment of rights; and another which portrays them as children, irrespective of their First Nations identity for access to those rights. With the *Convention*, they gain the right to speak for themselves. However, as Barry Morris asserts that in the construction of their identity, "they lose the right to speak for themselves as the production of their identity is invested in experts and authorities and are mediated by institutions of the state system."¹⁴⁹ Falk more forcefully states that national identity converted to legal status conferred by the state does not correspond with their ethnic, psychological and political reality.¹⁵⁰ While the *Convention* creates a new institutional space for the "expression of otherness," it also perpetuates an area of struggle for First Nations children.

¹⁴⁹Barry Morris, "The Politics of Identity: From Aborigines to the First Australian," in Jeremy Beckett, ed., Past and Present: The Construction of Aboriginality (Canberra: Aboriginal Studies Press, 1988), 64.

¹⁵⁰Richard Falk, "The Struggle of Indigenous Peoples and the Promise of Natural Political Communities," in Ruth Thompson, ed., The Rights of Indigenous Peoples in International Law (Sask: University of Saskatchewan Native Law Centre, 1987), 60.

Chapter Five

Conclusion

I return to the beginning of this study, wherein the central question of this analysis was put forth: Is the Convention an appropriate and effective instrument to protect and promote the rights of First Nations children? I submit that, insofar as the Convention recognizes indigenous children as objects of protection, it does so clearly. With respect to the empowerment of rights, through the protection and promotion of their rights, this analysis has suggested that the Convention is an ineffective instrument.

The theory of rights, rooted in the individual pursuit of life, liberty and property, runs contrary to the essence of First Nations being. Further, the plurality of legal codes gives rise to competing rights. As Olsen argues,

[t]he Convention is indeterminate insofar as it supports flatly conflicting and contradictory rights. Children's rights to care conflicts with their right to autonomy, their right to formal equality with their right to autonomy, their and others' rights to security with their and others'

right to freedom of action, and their rights
with the rights of others, especially mothers.¹⁵¹

For First Nations children, I would add the right to their indigenous identity with their rights as children. For them, the Convention represents only a partial interpretation of who they are.

Lastly, I reiterate that the universality of rights creates a myth of rights for First Nations children. The lack of "subject positioning" renders it an inappropriate and ineffective instrument to protect and promote their rights.

The historic and material assumptions on which the Convention is based do not allow for the inclusion of the lived experiences of First Nations children. The introduction of children's rights, however noble the intention, closes up a space for alternative conceptions of social relations. As Michael King and Christine Piper assert in examining the issue of children as bearers of rights,

[t]o see social relations in terms of rights is all to structure and understand the world in a very different way than to evaluate them, for example, according to the level of love or trust they contain.¹⁵²

¹⁵¹Olsen, "Feminist Approaches to Children's Rights," 195.

¹⁵²Michael King and Christine Piper, How the Law Thinks about Children (Dordrecht: Martinus Nijhoff Publishers, 1992), 69.

For First Nations children, their social relations are categorized for them in a manner which devalues who they are. They are forever caught in competing discourses, not only in the attendant conflictual positions posed by positive rights, but in their ethnicity. As with class and gender, ethnicity is a factor in determining what is best for a child.

Canada's first report to the Commission pertaining to the first five years of the implementation of the Convention contained some information on the status of First Nations children. This would seem to be an indication of Canada's adherence to the Convention, an attempt to redress the wrongs of the past, and fulfil its moral obligation among States with respect to Canada's children. The Commission responded with further questions regarding First Nations children, an indication of the international community's concern. Six out of the twenty-nine questions pertained to First Nations children. In the end, however, the report of the International Committee on the Rights of the Child lauded Canada's "general strengthening of the protection of human rights, particularly children's rights through the Canadian Charter of Rights and Freedoms and through the adoption of legislative

measures in the field of children's rights."¹⁵³ This statement was made in spite of the report's conclusion regarding the state of Canada's First Nations children:

While recognizing the steps already taken, the Committee notes with concern the special problems still faced by children from vulnerable and disadvantaged groups, such as aboriginal children, with regard to the enjoyment of their fundamental rights, including access to to housing and education.¹⁵⁴

The Committee suggested strengthening efforts such that aboriginal children may "benefit from positive measures aimed at facilitating access to education and housing. Research should be developed on the problems with respect to the growing rate of infant mortality and suicide among children and aboriginal communities."¹⁵⁵

I suggest that while their intentions are clear, their efforts are misguided. The rights of First Nations children are profoundly political and intrinsically linked to the current struggle of First Nations to self-determination and self government. They cannot be extracted from the social, political and legal discourses deployed

¹⁵³CRC/C15/Add.37, 2, as excerpted in Sanders, "International Human Rights Law, Spring 1996," A1-S-1.

¹⁵⁴CRC/C15/Add.37, 4.

¹⁵⁵CRC/C15/Add.37, 5.

by both the dominant and First Nations societies. And the extent to which their rights are guaranteed, protected and promoted depends on the level to which the State interprets Section 35 of the Canadian Constitution. In essence, First Nations children's mortality rate, literacy level, morbidity rate, child abuse, and so forth, depend on the political processes involved in renegotiating the past. For First Nations children, the Convention symbolizes a domain of political struggle. As the Native Council of Canada commented when asked to take part in preparing the State's response to the commission, "we appreciate that the Convention is the result of a political process ... we have been asked to comment on a process that we were not part of, but will most certainly be affected by."¹⁵⁶

To close, I support Olsen's assertion that "[t]he Convention fails to the extent it fails to challenge the categories through which we understand the world."¹⁵⁷ If we continually conceptualize and speak of ideas such as the rights of children and ethnicity in

¹⁵⁶The Native Council of Canada. "Report by the Native Council of Canada on Canada's response to the UN Convention on the rights of the Child," 2.

¹⁵⁷Olsen, "Feminist Approaches to Children's Rights," 195.

their most limited form in traditional categories, it is highly improbable that something as heralded as the Convention will ensure the healthy and harmonious development of First Nations children for seven generations.

BIBLIOGRAPHY

BOOKS

- Alston, Philip, ed. The Best Interests of the Child: Reconciling Culture and Human Rights. Oxford: Clarendon Press, 1994.
- An-Na'im, Abdullahi Ahmed, ed. Human Rights in Cross-Cultural Perspectives: A Quest for Consensus. Philadelphia: University of Pennsylvania Press, 1992.
- Asquith, Stewart and Malcolm Hill, eds. Justice for Children. Dordrecht: Martinus Nijhoff Publishers, 1994.
- Bala, Nicholas, Joseph Hornick and Robin Vogl, eds. Canadian Child Welfare Law: Children, Families and the State. Toronto: Thompson Educational Publishing, Inc., 1991.
- Bartlett, Katherine and Rosanne Kennedy, eds. Feminist Legal Theory: Readings in Law and Gender. Boulder: Westview Press, 1991.
- Beckett, Jeremy R., ed. Past and Present: The Construction of Aboriginality. Canberra: Aboriginal Studies Press, 1988.
- Blackburn, Robert and John Taylor, eds. Human Rights for the 1990s: Legal, Political and Ethical Issues. London: Mansell, 1991.
- Brolmann, Catherine, Rene Lefebvre, and Marjoleine Zieck, eds. Peoples and Minorities in International Law. Dordrecht: Martin Nijhoff Publishers, 1993.
- Churchill, Ward. Indians are us? Culture and Genocide in Native North America. Monroe: Common Courage Press, 1994.
- Cotterell, Roger. The Sociology of Law: An Introduction. London: Butterworths, 1984.

- Downing, Theodore E. and Gilbert Kushner, eds. Human Rights and Anthropology: Cultural Survival Report 24. Cambridge: Cultural Survival, Inc., 1988.
- Feibleman, James K. Justice, Law and Culture. Dordrecht: Martinus Nijhoff Publishers, 1985.
- Goodrich, Peter. Reading the Law: A Critical Introduction to Legal Method and Techniques. Oxford: Basil Blackwell, Ltd., 1986.
- Hufton, Olwen, ed. Historical Change & Human Rights. The Oxford Amnesty Lectures 1994. New York: Basic Books, 1995.
- Johnson, Barbara, ed. Freedom and Interpretation. The Oxford Amnesty Lectures 1992. New York: Basic Books, 1993.
- Kallen, Evelyn. Ethnicity and Human Rights in Canada. Toronto: Oxford University Press, 1995.
- Kerr, Joanna, ed. Ours By Right: Women's Rights as Human Rights. Ottawa: Zed Books/North South Institute, 1993.
- Knoppers, Bartha Maria, ed. Canadian Child Health Law: Health Rights and Risks of Children. Toronto: Thompson Educational Publishing, Inc., 1992.
- Krosenbrink-Gelissen, Lilliane Ernestine. Sexual Equality as an Aboriginal Right. Saarbrücken: Breitenbrach, 1991.
- Leblanc, Lawrence J. The Convention on the Rights of the Child: United Nations Lawmaking on Human Rights. Lincoln: The University of Nebraska Press, 1995.
- Morse, Bradford W., ed. Aboriginal Peoples & the Law: Indian, Metis and Inuit Rights in Canada. rev. 1st ed. Ottawa: Carleton University Press, 1991.
- Nickel, James W. Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration on Human Rights. Berkeley: University of California Press, 1987.
- Nino, Carlos Santiago. The Ethics of Human Rights. Oxford: Clarendon Press, 1991.

Peters, Julia and Wolper, Andrea, eds. Women's Rights, Human Rights. New York: Routledge, 1995.

Rogers, G. A. J., ed. Locke's Philosophy: Content & Context. Oxford: Clarendon Press, 1994.

Schabas, William A. International Human Rights Law and The Canadian Charter. Toronto: Carswell, 1990.

Shute, Stephen and Susan Hurley, eds. On Human Rights. The Oxford Amnesty Lectures 1993. New York: Basic Books, 1993.

Silman, Janet. Enough is Enough: Aboriginal Women Speak Out. Toronto: Women's Press, 1987.

Smart, Carol. Feminism and the Power of Law. New York: Routledge, 1989.

United Nations. Human Rights: A Compilation of International Instruments. Vol. I (First Part). New York: United Nations, 1994.

Von Glahn, Gerhard. Law Among Nations. 5th ed. Toronto: Maxwell Macmillan Canada, 1986).

_____. Law Among Nations. 6th ed. Toronto: Maxwell Macmillan Canada, 1992.

Wotherspoon, Terry and Vic Satzewich, Vic. First Nations: Race, Class and Gender Relations. Scarborough: Nelson Canada, 1993.

Williams, Patricia J. The Alchemy of Race and Rights. Massachusetts: Harvard University Press, 1991.

ARTICLES AND SPECIAL PUBLICATIONS

Avard, Denise and Louise Hanvey, eds. The Health of Canada's Children: A CICH Profile. 2nd ed. Ottawa, Canadian Institute of Child Health, 1994.

- Assembly of First Nations. "To Respect the Child You Must Respect the People: A Study of the Articles of the United Nations Convention on the Rights of the Child." Ottawa, November 1993 [photocopy].
- Bell, Diane. "Considering Gender: Are Human Rights for Women, Too" An Australian Case." In Human Rights in Cross Cultural Perspectives, ed. Abdullahi Ahmed An-Na'im. Philadelphia: University of Pennsylvania Press, 1992: 339-362.
- Bellis, Mark. "Mom fights to regain daughter." Toronto Star 05 July 1995: A20.
- Bull, Samuel. "The Special Case of the Native Child." The Advocate 47, 4 (1989): 523-531.
- Canadian Council for Children and Youth. "Convention on the Rights of the Child: Background." Ottawa [Photocopy].
- Canadian Council on Children and Youth. Admittance Restricted: The Child as Citizen in Canada. Ottawa: CCCY, 1978.
- Carrington, Paul D. "Aftermath." In eds. P. Cane and J. Stapleton, Essays for Patrick Atiyah. Clarendon Press, 1991: 113-150.
- Cohen, Cynthia Price. "The Developing Jurisprudence of the Rights of the Child." St. Thomas Law Review 6, 1 (1993): 1-96.
- _____. "International Protection of the Rights of the Indigenous Child." St. Thomas Law Review 7, 3 (1995): 551-567.
- Davies, Maureen. "Aspects of Aboriginal Rights in International Law." In Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada, ed. Bradford W. Morse. rev. 1st ed. Ottawa: Carleton University Press, 1991: 16-46.
- D'Sa, Rose. "The United Nations Convention on the Rights of the Child." Commonwealth Law Bulletin 19, 3 (1993): 1274-1283.
- Dollin, Janet. "Health of Canada's children: A family physician's view." Canadian Family Physician 41 (1995): 959-960.

Donnelly, Jack. "Third Generation Rights." In eds. Catherine Brolmann, Rene Lefebvre and Marjoleine Zieck, Peoples and Minorities in International Law, Dordrecht: Martinus Nijhoff Publishers, 1993: 119-150.

Falk, Richard, "Cultural Foundations for the International Protection of Human Rights." In Human Rights in Cross Cultural Perspectives, ed. Abdullahi Ahmed An-Na'im. Philadelphia: University of Pennsylvania Press, 1992: 44-64.

_____. "The Struggle of Indigenous Peoples and the Promise of Natural Political Communities." In The Rights of Indigenous Peoples in International Law, ed. Ruth Thompson. Saskatchewan: University of Saskatchewan Native Law Centre, 1987: 59-68.

Fiske, Jo-Anne. "The Supreme Law and the Grand Law: Changing Significance of Customary Law for Aboriginal Women of British Columbia." BC Studies 105-16 (1995): 183-199.

_____. "The Womb is to the Nation as the Heart is to the Body." Paper presented to the XIII World Congress of Sociology, International Sociology Association, Bielefeld, Germany, July 18-23, 1994.

Gooneseckere, Savitri. Women's Rights and Children's Rights: The United Nations Convention as Compatible and Complementary International Treaties. Innocenti Occasional Papers. Florence: UNICEF, 1992.

Himes, James R. The United Nations Convention on the Rights of the Child: Three Essays on the Challenge of Implementation. Innocenti Essays. Florence: UNICEF, 1993.

Howard, Rhoda. "Dignity, Community and Human Rights." In Human Rights in Cross Cultural Perspectives, ed. Abdullahi Ahmed An-Na'im. Philadelphia: University of Pennsylvania Press, 1992: 81-104.

Johnson, Barbara. "Introduction." In Freedom and Interpretation, ed. Barbara Johnson. New York: Basic Books, 1993: 1-17.

- Kline, Marlee. "Child Welfare Law, "Best Interests of the Child" Ideology, and First Nations." Osgoode Hall Law Journal 30, 2 (1992): 375-425.
- Kly, Y. N. "On the Meaning and Significance of the United Nations Convention on the Rights of the Child." Canadian Review of Social Policy/Revue canadienne de politique sociale 27 (1991): 67-73.
- Lerner, Natan. "The Evolution of Minority Rights in International Law." In Peoples and Minorities in International Law, eds. Catherine Brolmann, Rene Lefebvre and Marjoleine Zieck. Dordrecht: Martinus Nijhoff Publishers, 1993: 77-102.
- Mackinnon, Catherine, "Crimes of War, Crimes of Peace." In On Human Rights, eds. Stephen Shute and Susan Hurley. New York: Basic Books, 1993: 83-109.
- McKenzie, Brad and Peter Hudson. "Native Children, Child Welfare and the Colonization of Native People." In The Challenge of Child Welfare, eds. Kenneth L. Levitt and Brian Wharf. Vancouver: University of British Columbia Press, 1985: 125-140.
- Metis National Council. "Metis National Council Report on the United Nations Convention on the Rights of the Child." June 1993 [photocopy].
- Monture, Patricia, "A Vicious Circle: Child Welfare and the First Nations." Canadian Journal of Welfare Laws 3, 1 (1989): 1-17.
- Morris, Barry. "The Politics of Identity." In ed. Jeremy Beckett, Past and Present: The Construction of Aboriginality. Canberra: Aboriginal Studies Press, 1988: 63-85.
- Morse, Bradford W. "Indian and Inuit Family Law and the Canadian Legal System." American Indian Law Review 8, 2 (1981): 199-257.
- Native Council of Canada. "Report by the Native Council of Canada on Canada's Response to the UN Convention on the Rights of the Child." July 1993 [photocopy].

Native Women's Association of Canada. "Aboriginal Children's Rights: 1993 NWAC Report on the Convention on the Rights of the Child." Ottawa, June 1993 [photocopy].

_____. Guide to Bill C-31. Ottawa: NWAC, 1986.

_____. Matriarchy and the Canadian Charter: A Discussion Paper. Ottawa: NWAC, 1993.

Nowak, Manfred, "The Evolution of Minority Rights in International Law, Comments." In Peoples and Minorities in International Law, eds. Catherine Brolmann, Rene Lefebvre and Marjoleine Zieck. Dordrecht: Martinus Nijhoff Publishers, 1993: 103-118.

Olsen, Frances. "Children's Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child." International Journal of Law and the Family 6, 1 (1992): 192-220.

Sanders, Douglas. "International Human Rights Law, Spring 1996." [Course material] Faculty of Law, University of British Columbia, Vancouver.

Shaheed, Farida. "Controlled or Autonomous: Identity and the Experience of the Network, Women Living Under Muslim Laws." Signs: Journal of Women in Culture and Society 19 (1994): 997-1019.

Sinclair, Murray, Donna Phillips and Nicholas Bala. "Aboriginal Child Welfare in Canada." In Canadian Child Welfare Law: Children, Families and the State, ed. Nicholas Bala, et. al. Toronto: Thompson Educational Publishing, Inc., 1991: 171-194.

Tully, James W. "Rediscovering America." In Locke's Philosophy: Content and Context, ed. G.A.J. Rogers. Oxford: Clarendon Press, 1994. 165-196.

Turpel, Mary Ellen/Aki-Kwe, "Aboriginal peoples and the Canadian Charter of Rights and Freedoms: Contradictions and Challenges." Canadian Women's Studies 10-2/3: 149-157.

UNICEF Canada. "The Convention on Children's Rights: A Summary." [Pamphlet] 1994.

_____. "Children's Rights in Canada." [information sheet].

Zion, James W. "North American Indian Perspective on Human Rights."
In Human Rights in Cross Cultural Perspectives, ed. Abdullahi
Ahmed An-Na'im. Philadelphia: University of Pennsylvania
Press, 1992. 191-220.

GOVERNMENT DOCUMENTS

Bobbet, Ellen. Inequalities in Health: A Comparison of Indian and
Canadian Mortality Trends. Ottawa: Health and Welfare Canada,
1990.

Community Panel. Family and Children's Services Legislation Review
in BC. Aboriginal Committee. Liberating Our Children:
Liberating Our Nations. Victoria: Ministry of Social Services,
1992.

Human Rights Directorate. Department of Canadian Heritage.
Convention on the Rights of the Child: First Report of Canada
May 1994. Ottawa: Human Rights Directorate, 1994.

_____. "Response of Canada to the List of Issues to be Taken up
in Connection with the Consideration of the Initial Report of
Canada (April 1995)." [photocopy].

Ontario Court of Justice. General Division. de Wilner v. Wilner.
[1996] O.J. No. 670.

Panel to Review Adoption legislation in BC. Report to the Minister
of Social Services. Victoria: Ministry of Social Services,
1994.

Rowe, G. and M. J. Norris. Mortality Projection of Registered
Indians 1982 to 1996. Ottawa: Statistics Canada, 1985.

Statistics Canada. Schooling, Work and Related Activities, Income,
Expenses and Mobility. 1991 Aboriginal Peoples Survey.
Ottawa: Ministry of Industries, Science and Technology, 1993.